TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 557.

IRA Y. MUNN & GEORGE L. SCOTT, PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED OCTOBER 7, 1874.

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1 At a supreme court, begun and held at Ottawa, on Tuesday, the ninth day of September, in the year of our Lord one thousand eight hundred and seventy-three, within and for the northern grand division of the State of Illinois.

Present, Sidney Breese, chief-justice; Pinkney H. Walker, justice; W. K. McAllister, justice; John Scolfield, justice; John M. Scott, justice; Benjamin R. Sheldon, justice; Alfred M. Craig, justice.

IRA Y. MUNN AND GEORGE L. SCOTT *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.	18 P. D. Error to the criminal court of Cook County.

Be it remembered that heretofore, to wit, on the eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-two, came Ira Y. Munn and George L. Scott, by John N. Jewett and Samuel W. Fuller, their attorneys, and filed in said supreme court their certain transcript of record and proceedings of the criminal court of Cook County, State of Illinois, in the above-entitled cause; which is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Pleas before the criminal court of Cook County, in said county and State, at a term thereof begun and held at the court-house in the city of Chicago, in said county, on the first Monday (being the first day) of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth. Present: honorable W. W. Farwell, judge of the circuit court of Cook County and ex-officio judge of the criminal court of Cook County; Charles H. Reed, State's attorney; Timothy M. Bradley, sheriff of Cook County.

Attest: DANIEL O'HARA, *Clerk.*

Be it remembered, to wit, on the twenty-ninth day of June, in the year last aforesaid, it being of the June term of court aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS *vs.* IRA Y. MUNN AND GEORGE L. SCOTT.	Information for transacting business as public warehousemen without license.

3 This day comes, in his own proper person, Chas. H. Reed, State's attorney in & for the seventh judicial circuit of the State of Illinois, and, by leave of court, files his information against said Ira Y. Munn and said George L. Scott, in the above-entitled cause;

Which said information for transacting business as public warehousemen without license, with the endorsements thereon, is in the words and figures following, to wit:

STATE OF ILLINOIS,
Cook County, ss:

Of the June term of the criminal court of Cook County, in said county & State, in the year of our Lord one thousand eight hundred and seventy-two.

Now on this day comes into open court, in his own proper person,

Charles H. Reed, State's attorney in and for said county, in the name and by the authority of the people of said State of Illinois, and prosecutes in his own behalf, for and on behalf of said people, and informs said court that Ira Y. Munn and George L. Scott, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and seventy-two, at and within the city of Chicago, in said county of
4 Cook, in the State of Illinois aforesaid, were the managers of a certain public warehouse located in said city of Chicago, known as "The Northwestern Elevator," and that the said Ira Y. Munn and George L. Scott did then and there store grain in bulk in said warehouse, and did then and there mix the grain of different owners together in said warehouse, and that the said city of Chicago did then & there contain more than one hundred thousand inhabitants, and that they, the said Ira Y. Munn and George L. Scott, did then and there unlawfully transact the business of public warehousemen, in said warehouse, in the manner and form aforesaid, and that they, the said Ira Y. Munn and George L. Scott, did not procure a license from the circuit court of said county permitting them to transact business as public warehousemen, in said warehouse, in manner and form as aforesaid under the laws of said State of Illinois, before transacting the business aforesaid of public warehousemen as aforesaid, contrary to the statute, and against the peace and dignity of the same people of the State of Illinois.

And now on this day further comes into open court, in his
5 own proper person, Charles H. Reed, State's attorney in and for said county, in the name and by the authority of the people of said State of Illinois, and further prosecutes in his behalf, for and on behalf of said people, and further informs said court that the said Ira Y. Munn and George L. Scott, on the said twenty-eighth day of June, in the year of our Lord one thousand eight hundred and seventy-two, at and within the said city of Chicago, in said county of Cook, in the State of Illinois, aforesaid, were the lessees of the said public warehouse, known as "The North[illegible]ern Elevator," and that they, the said Munn & Scott, did t[illegible] and there store grain in bulk in said warehouse, and did then and there mix the grain of different owners together in said warehouse; and that said warehouse is located in the city of Chicago; and that said city of Chicago did then and there contain more than one hundred thousand inhabitants; and that they, the said Munn and Scott, did then and there unlawfully transact the business of public warehousemen in said warehouse, in the manner and form aforesaid; and that they, the said Munn and Scott, did not procure a license from the circuit court of said county permitting them
6 to transact business as public warehousemen in said warehouse, in the manner and form aforesaid, under the laws of said State of Illinois, before transacting the business aforesaid of public warehousemen as aforesaid, contrary to the statute and against the peace and dignity of the same people of the State of Illinois.

CHARLES H. REED,
State's Attorney.

(Endorsed:) Criminal court of Cook County, June term, 1872. The People of the State of Illinois versus Ira Y. Munn, George L. Scott. Information for transacting business as public warehousemen without license. Witnesses, Stephen Clary Norman, T. Gassette, Mr. Tompkins. Filed June 29, 1872. Daniel O'Hara, clerk.

And afterwards, to wit, on the sixth day of July, in the year last aforesaid, it being the July term, A. D. 1872, of the court aforesaid, the following, among other proceedings, were had and entered of
7 record in said court, which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF Illinois
vs.
IRA Y. MUNN & GEORG' L. SCOTT.
} Information for transacting business as public warehousemen without license.

This day come the said people, by Charles H. Reed, States attorney, and the said defendants by Messrs. J. N. Jewett and Samuel W. Fuller, their counsel, also come, and the said defendants, by their aforesaid counsel, now move the court to quash the information in this cause, for reasons stated, and the court, hearing counsel in support of said motion to quash, as well as in opposition thereto, and being now fully advised in the premises, doth overrule said motion, and orders that said motion to quash be, and the same is hereby, overruled accordingly; to which ruling of the court in overruling said motion the said defendants, by their aforesaid counsel, now here, except. And the said defendants, having been furnished with a copy of the information in this cause
8 and lists of the names of the witnesses and jurors, & being now here duly arraigned and forthwith demanded of and concerning the crime alleged against them in said information, how they will acquit themselves thereof, for a plea in that behalf, by their counsel, now here, severally say that they are not guilty in manner and form as charged therein, and of this they put themselves upon the country, and the said people do the like. And now, issue being joined, by agreement of said parties, now here, made in open court, this cause is submitted to the court for trial, and the intervention of a jury waived; and the court having read the agreed statement of facts on file herein, and being now fully advised in the premises, doth find the defendants guilty. Whereupon the defendants, by their aforesaid counsel, now here, submit their motion to set aside the above finding, and for a new trial, and in arrest of judgment herein. And the court being fully advised in the premises, doth overrule said motions and orders, that said motions to set aside said finding, and for a new trial, and in arrest of judgment, be,
9 and the same are hereby, overruled accordingly; to which ruling of the court in overruling said motions the said defendants, by their aforesaid counsel, now here, except.

And now, the said defendants, nor their counsel for them, saying anything further why the judgment of the court should not now be pronounced against them, on the finding of guilty heretofore rendered to the information in this cause—

Therefore, it is ordered and adjudged by the court that the said defendants be fined the sum of one hundred dollars, and pay all the costs of these proceedings, and that said people have execution therefor.

The "agreed statement of facts" referred to in the above order is as follows:

STATE OF ILLINOIS,
Cook County, ss:

In the criminal court of Cook County, as of the July term, A. D. 1872.

THE PEOPLE OF THE STATE OF ILLINOIS }
vs.
IRA Y. MUNN, GEORGE L. SCOTT. }

Prosecution by information for violation of section, 3, 4, and 5 of the warehouse law, approved April 22d, A. D. 1871.

Plea of not guilty.

And now come the said respondents and say that they are not guilty in manner and form alleged in the information filed in this proceeding, and put themselves upon the country for trial.

By their attorneys—

JNO. N. JEWETT AND
SAM'L W. FULLER.

Agreed statement of facts in the above-entitled cause for the purposes of this trial.

It is agreed that the respondents leased the premises in the city of Chicago, Cook County, State of Illinois, whereon the "Northwestern Elevator" stands, of the owner, in the year A. D. 1862; and that respondents in that year, with their own capital and means, erected thereon the grain warehouse or elevator described in the information in this proceeding as the "Northwestern Elevator," and that they have ever since that date carried on in said elevator, and by means thereof, the business of receiving, storing, and handling grain for hire, for which they have charged and received as a compensation such rates of storage as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city in the month of January of each year, as the established rates for the year then next ensuing such publication.

And for the purpose of this trial it is further agreed that at the time stated in the information, to wit, the 28th day of June, A. D. 1872, the respondents were the managers and proprietors of the grain-warehouse known and described in the information in this proceeding as the "Northwestern Elevator," situate in the city of Chicago, county of Cook, and State of Illinois, wherein grain was stored in bulk, and in which the grain of different owners was mixed together by said managers, and that the said respondents were then and there, in and by means of said elevator, carrying on the business of receiving, storing, & delivering grain for hire without having taken out a license from the circuit court of Cook County aforesaid, permitting them as such managers to transact business as public warehousemen under the laws of the State, and without having filed with the clerk of the circuit court of Cook County a bond to the people of the State of Illinois as is prescribed and required by the 3rd and fourth (4th) sections of an act of the legislature of this State, entitled "An act to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to Article XIII of the constitution of this State, approved April 25th, A. D. 1871."

And it is further admitted that the city of Chicago did, on the 28th day of June, A. D. 1872, and for more than two years prior thereto, have more than 100,000, inhabitants.

It is further admitted, for the purposes of the trial, that the respondents on the 28th day of June, A. D. 1872, and for one year previous thereto, had stored and mixed the grain of different owners together in said "Nortwestern Elevator," only by and with the express consent and permission of such owners or of the consignee of such grain; who also consented not only that such grain should be received, stored, &
13 mixed together by the respondents in manner aforesaid, but that it should be done for, and subject to the established and published rates of storage demanded by said respondents and the other warehousemen in the city of Chicago for the current years 1871 and 1872.

It is further agreed for the purposes of this trial that during the first week in January, of the year A. D. 1872, the said respondents, together with the other warehousemen transacting business in the city of Chicago, published in one or more of the daily papers in the said city of Chicago a table or schedule of rates for the storage of grain in said warehouse during the then ensuing and present current year A. D. 1872, as required by section 15 of the act of the legislature, which published rates were as follows:

ELEVATOR NOTICE.

Rates of storage for 1872.

Until the second Monday of January, 1873, the following rates of storage will be charged by us: On grain received in bulk from cars, and inspected in good condition, two cents per bushel for the first
14 twenty days or part of same, and one-half cent per bushel for each additional ten days or part of same, so long as it remains in good condition.

On all rejected grain, received in bulk from cars, two cents per bushel for the first twenty days or part of same, and one-half cent per bushel for such additional five days or part of same.

On condemned grain, such as is unfit for warehousing, received from cars, two cents per bushel for first five days or part of same, and one cent per bushel for each additional five days or part of same.

On grain received from teams and inspected in good condition, three cents per bushel for the first twenty days, or part of same, and one-half cent per bushel for each additional ten days, or part of same, so long as it remains in good condition.

On all rejected grain received from teams, three cents per bushel for first five days, or part of same, and one-half cent per bushel for each additional five days or part of same.

On grain received in bulk from canal-boats or vessels, and inspected in good condition, one and one-half cents per bushel for first ten
15 days or part of same, and one-half cent per bushel for the next ten days or part of same, and one-half cent per bushel for each additional ten days or part of same, so long as it remains in good condition.

On unsound or condemned grain received in bulk from canal-boats or vessels, two cents per bushel for first five days or part of same, and one cent per bushel for each additional five days or part of same.

On and after the 15th day of November next, upon grain in good con-

dition, storage will be at the foregoing rates until four cents per bushel shall have accrued; after which no additional storage will be charged until the 15th day of April, 1873, so long as the grain remains in good condition.

Upon unsound grain, not in good condition, there will be no special rate for winter-storage, but it will be subject to the same charge as grain of the same quality received prior to the 15th of November.

All grain that may become heated or out of condition while in store, will be charged one cent per bushel for each additional five days
16 or part of same; that said grain shall remain in store five days after notice has been given by posting said notice upon the bulletin-board of the Chicago Board of Trade, that such grain has become heated or out of condition.

No grain will be received in store until it has been inspected and graded by authorized inspectors, unless by special agreement.

MUNN AND SCOTT.

And it is further admitted, that ever since the publication of such rates of storage, in January, 1872, until & on the 28th day of June, A. D. 1872, the said respondents did, as managers of said warehouse, known as the "Northwestern Elevator," charge and receive the rates of storage set out in said advertisement.

It is further agreed, for the purposes of the trial, that the said respondents have, ever since the act of the legislature, heretofore particularly cited and referred to, took effect, to wit, ever since the first day of July, A. D. 1871, until and on the 28th day of June, A. D. 1872, complied with all the requirements of sections 2 and 3 of article 13 of the present constitution of this State, entitled "warehouses;" and also, that during all the time aforesaid, the said respondents did,
17 at the county aforesaid, and in the conduct and management of their business of receiving, storing, and handling grain in said "Northwestern Elevator," comply with all the requirements of the said act of the legislature of this State, more particularly described as "An act to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to article XIII of the constitution of this State, approved February 25th, 1871," and did also comply with all the rules and regulations prescribed by the officers appointed under said act to carry out and administer the same, except in these two particulars, that the said respondents have never taken out a license, nor given any bond, as required by sections 3 and 4 of said act of the legislature, and also in this, that said respondents did, during all the time aforesaid, charge for storage and handling of grain in said "Northwestern Elevator," the rates of charges established and published in the newspapers in the month of January, A. D. 1872, which are higher
18 rates in storage per bushel than the maximum rates specified in section 15 of the warehouse act, approved 25th April, 1871.

It is hereby stipulated and agreed, for and on behalf of the people, that the foregoing statement of facts is true, and that the same is immaterial and irrelevant, and ought not to be considered by the court, except as to so much thereof as sets forth and admits as follows, to wit:

I. That the city of Chicago had a population of one hundred thousand inhabitants.

II. That the respondents were the proprietors and managers of the "Northwestern Elevator," the same being a grain-warehouse, in which grain was stored in bulk, and the grain of different owners was mixed together, and situate in said city of Chicago.

3. That the respondents transacted the business of warehousemen in said warehouse, and stored grain in bulk, and mixed the grain of different owners together, without first taking out a license from the circuit court of Cook County, permitting them to transact the business
19 of public warehousemen in said warehouse under the laws of this State, and without having filed with the clerk of the circuit court of Cook County a bond to the people of the State of Illinois, as provided by the 3rd & 4th sections of the act in said statement referred to.

It is further agreed, for the purposes of this trial, that the foregoing statement of facts shall be received and considered by the court with like legal effect as if the same were given in evidence by witnesses or other competent legal evidence, so far as the court shall deem the same admissible and competent to be considered on the trial of this cause; and that thereupon, after argument by counsel for the people and said respondents, (if either party should desire to argue the same,) such judgment shall be rendered by the court as it shall deem proper and warranted by the law and the evidence in the cause, saving and preserving to both parties all rights and advantage of exception to such decision of the court, the same as if a trial by a jury or before the court had been had, and such exception and advantage had been taken and saved by
20 means of timely and proper rules of exceptions thereto.

CHARLES H. REED, *State's Attorney.*
JNO. N. JEWETT & SAM'L W. FULLER,
Attys. for Respondents.

And now, after trial and judgment, come the said parties, by their respective counsel, and stipulate that the foregoing agreed statement of facts and the objections made thereto on the part of the people of the State of Illinois, shall be filed and entered as part of the record of this proceeding, with like legal effect as a bill of exceptions, and shall be incorporated in the record made up for the Supreme Court, and that on filing the record in the Supreme Court, the people of the State of Illinois, by their attorney, do hereby waive the issuing and service of a writ of error, and agree to join in error and submit this cause to the consideration of the court at the next term.

By their attorneys,

CHARLES H. REED, *State's Attorney.*
JOHN N. JEWETT, SAM. W. FULLER,
Attorneys for Respondents.

CHICAGO, *July 6th*, 1872.

21 STATE OF ILLINOIS,
Cook County, ss:

I, Daniel O'Hara, clerk of the criminal court of Cook, in said county and State, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record in a certain cause lately pending in said court, wherein The People of the State of Illinois were plaintiffs and Ira Y. Munn and George L. Scott defendants.

Witness Daniel O'Hara, clerk of said court, and the seal thereof, at Chicago, in said county, this fifteenth day of July, A. D. 1872.

[SEAL.] DANIEL O'HARA, *Clerk.*

[Revenue-stamp. D. O'Hara, 15 July, '72.]

22 And afterwards, to wit, on the 22d day of August, A. D. 1872, Ira Y. Munn and George L. Scott, by John N. Jewett and Samuel W. Fuller, their attorneys, filed their "assignment of errors," which is in words and figures as follows, to wit:

In the supreme court of the State of Illinois, northern grand division, September term, A. D. 1872.

IRA Y. MUNN AND GEORGE L. SCOTT, PLAINTIFFS in error, *vs.* THE PEOPLE OF THE STATE OF ILLINOIS. } Error to the criminal court of Cook County, Illinois.

Assignment of errors.

And now come the said Ira Y. Munn and George L. Scott, and say that in the foregoing record and proceeding there is manifest error, in this:

First. That the criminal court of Cook County erred in overruling their motion to quash the information.

23 Second. That said court erred in overruling their motion for a new trial.

Third. That said court erred in finding plaintiffs in error guilty as charged in the information, and in imposing upon them a fine of one hundred dollars.

Fourth. That the court erred in overruling the motion of plaintiffs in error in arrest of judgment.

Fifth. That the court erred in not finding plaintiffs in error not guilty and discharging them from further proceedings in that behalf.

By their attorneys.

JNO. N. JEWETT AND
SAMUEL W. FULLER.

CHICAGO, *August* 22, *A. D.* 1872.

And afterwards, to wit, on the 28th day of August, A. D. 1872, the said people, by Charles H. Reed, State's attorney, filed their joinder in error, which is in words and figures as follows, to wit:

24 *Joinder in error.*

And the said people, by Charles H. Reed, State's attorney, come and say that there is no error in the record, proceedings, and judgment aforesaid, and pray that the said judgment be affirmed.

August 28, 1872.

CHARLES H. REED,
State's Attorney.

25 September term, A. D. 1873, to wit, on the 22d day of September, in the year of our Lord one thousand eight hundred and seventy-three, the same being one of the days of said term; present as on the first day.

IRA Y. MUNN AND GEORGE L. SCOTT *vs.* THE PEOPLE OF THE STATE OF ILLINOIS. } 18, P. D. Error. The criminal court of Cook.

On this day this cause is taken on call by the court. Abstracts and briefs filed.

26 And afterwards, to wit, on the 30th day of January, in the year of our Lord one thousand eight hundred and seventy-four, being

in vacation after September term, A. D. 1873, there was filed in the clerk's office of said supreme court certain opinions, which are in the words and figures following, to wit:

IRA Y. MUNN AND GEORGE L. SCOTT *vs.* THE PEOPLE OF THE STATE OF ILLINOIS. } No. 18, P. D. Error to the criminal court of Cook County.

Opinion by Walker, [*Breese,*] *C. J.—Filed January 30th,* 1874.

This was a proceeding by information in the criminal court of Cook County, on behalf of the people, against Ira Y. Munn and George L. Scott, for a violation of the third and fourth sections of an act of the general assembly of this State entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of the State," approved April 25th,
27 1871. The information was filed by the State's attorney at the July term, 1872. A motion to quash having been overruled, the defendants pleaded not guilty, waived a trial by jury, and submitted the case to the court. The court found the defendants guilty, and, overruling a motion for a new trial and in arrest of judgment, adjudged against them a fine of one hundred dollars and the costs. To reverse this judgment the defendants bring the record here by writ of error, assigning various errors, one of which raises the question of the constitutionality of the act under which the proceedings were had, and is the only important question in the case. This is the second argument of the case. On the first argument, at the last term, the court, after much deliberation, were unable to reach a satisfactory conclusion. In the mean time the court had undergone a change by the election of two new members, and it was deemed expedient and proper that they should take part in the decision; and, to enable them to participate, a re-argument was directed, and the questions have again been fully, elaborately,
28 & ably discussed. A case of so much importance demanded and has received our most careful consideration, and we are prepared to state the conclusion which a majority of the court has reached. We do not deem it necessary to take up seriatim and discuss the various propositions presented by counsel, or go over the field of argument they have so fully explored; but, in what we shall say, it will be found they have all been considered. Plaintiffs in error insist the statute in question is repugnant to this provision of our constitution, found in the "bill of rights" as clause 2 of art. 2: "No person shall be deprived of life, liberty, or property without due process of law," and to this other provision in clause 13 of the same article: "Private property shall not be taken or damaged for public use without just compensation." One of the counsel for appellants makes these points in addition: That the act is repugnant to the 14th amendment of the Constitution of the United States; and, further, if its provisions can be construed as an inhi-
29 bition of the warehousing business, except under special conditions, and as confining the privilege of doing that kind of business upon persons able or willing to comply, and actually complying, with these conditions, then, in so far as it is not based upon article 13 of the State constitution, it is repugnant to section 22 of article 4, which prohibits the general assembly from passing any local or special law "granting to any corporation, association, or individual any special or exclusive privilege or immunity whatever." We will consider the propositions first as they appear to be thrown into the controversy as mere

make-weights, the real merits resting in the two first. As to the repugnancy of the warehouse act to the first clause of the 14th amendment of the Constitution of the United States, a slight consideration of that amendment and judicial decisions upon it will be sufficient to satisfy any one it has no application to this case.

That amendment is as follows: "All persons born or naturalized in the United States, or subject to the jurisdiction thereof, are
30 citizens of the United States and of the State wherein they reside.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It is well known the amendment in question was incorporated into the Federal Constitution to shield a certain class who had been born and raised in slavery, from pernicious legislation, by which their newly acquired rights by their emancipation might be so crippled as to render them wholly worthless.

In the discussion upon the effects of this amendment in the slaughter-house cases from New Orleans, and the case of Myra Bradwell, plaintiff in error, taken up from this court, it was not intimated by the Supreme Court of the United States that a regulation by a State
31 legislature of a permit or profession, as a regulation of the use of property, abridged in any manner the liberty of the citizen, white or black.

Upon the other proposition we cannot perceive that the statute can receive the construction contended for. The section relied on is in these words: the general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say—then follows a large number of specified subjects, the last of which is this, granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.

The inhibition extends only to passing special laws for such purposes.

But the law in question is general in its objects, operative throughout the State, and confers no immunity or special or exclusive privilege or franchise upon any individual, association, or corporation.

It deals with an existing business closely associated with the great agricultural interests of the State, and seek' to regulate it by law.
32 This is the whole scope of the act. But the important question remains as presented in the first two points made by appellants, and argued with great ability.

Does the act in question deprive the owners or managers of this warehouse of their property, in the sense of the Constitution? If it does, it is void and must be so declared. This view of appellants seems to be based, in a great measure, on the fact that they had constructed their warehouse and established their business long anterior to the enactment of this law. It was established while there was free trade in the business, & their charges were subject to regulation only by competition and agreement, and now claim a right to continue such use without legislative restraint. They further say they have complied with all the provisions of the act except the one requiring them to take out a license and enter into bond.

The argument is, by this legislative interference they are deprived of the use of their property, and, so depriving them of its free and
33 untramelled use, they are deprived of their property in the sense of

this clause of the bill of rights. Much ingen'ous argument has been employed to establish this proposition, and the case of Wyrehermen vs. The People, 3 Kernan, (N. Y.,) 378, cited as 13 N. York, invoked in support and greatly relied on. We have looked into that case, and find that the court was divided in opinion, and the judges who held the act unconstitutional were led to that conclusion, because by the terms of the act itself the property in intoxicating liquors was substantially destroyed, and thus the owner deprived of his property by mere legislative will. They say if the act by its terms had been applicable only to liquors imported or manufactured after it took effect, it would not have been in conflict with the constitutional provision declaring that "no person shall be deprived of life, liberty, or property without due process of law."

The question before the court was, did the prohibitions & penalties of the act pass the boundaries of mere regulation and police, and by their own force work the essential loss or destruction of the
34 property at which it was aimed? The law in question subjected the liquors to seizure and physical destruction, as they were in every sense of the term property and so recognized by law; the owner was by mere legislation deprived of his property. It was held that by the operation of the law the commercial value of the liquors was annihilated; that it could not be sold; that it was unlawful to keep it; that all legal protection was withdrawn from it, and that it had become a public nuisance. These provisions and results, it was held, swept the liquors from the commerce of the State, and thus annihilated the quality of sale which made them valu'ble to the owner.

This, it was held, was destructive of the notion of property. It was further said, when a law annihilates the value of property and strips it of those attributes by which alone it is distinguished as property the owners is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.

35 This case is much relied on by one of the counsel for appellant, and a labored effort made to bring this within its scope. But the distinction is so obvious that *that* "he who runs may read." Had the act in question sought to deprive warehousemen of any of their antecedent acquisitions, or deprive them of the use of their establishments, or confiscate them, as was the case with the New York liquor-law, there would be some appositeness and analogy. Nothing of the kind has been done or attempted, and it is not even complained by the plaintiff in error, that by compliance with these sections of the law they would not receive a fair remuneration on their capital invested and reasonable recompense for all their labors and responsibility. In the case relied on the majority admitted the legislature could regulate trade in property of all kinds, but they could not totally annihilate commerce in any species of property and so condemn the property itself to extinction.

It was on this latter ground the law was held invalid. What anology, we ask, is there in these cases? Does the act of our generally
36 assembly destroy any species of property, or deprive its owners of the use of it? It does not aim at the extinction of these warehouses, or any of their attributes. The statute may affect them injuriously in a degree, but it does not say they shall not be allowed to exist at all.

The constitutional provision is, no person shall be deprived of life, liberty, or property, &c.

This clause nowhere declares that in the exercise of the admitted functions of government private property may not receive remote and consequent injury. No person can claim that in the exercise of the proper functions of government his property shall not be diminished in value.

The point is the owner shall not be deprived of his property without due process of law. If, in the exercise of any one of the admitted functions of government, a person's property is rendered less valuable, can it be seriously claimed this provision in the bill of rights has been infringed? Government in this State is reposed in three departments, composed of separate bodies of magistracy. The whole legislative power is
37 vested by the constitution in the general assembly, composed of two houses, the members of each to have certain qualifications and to be elected by the people. Every subject within the domain of legislation, and within the scope of civil government, not withdrawn from it by the constitution of the State or of the United States, can be dealt with by that body by general laws to oppress the whole State and all the people within it. That body is emphatically the guardian of the public interests and welfare, & would be derilict in its duty did it fail to exercise all its powers to their promotion and protection.

That body is the sole judge of all such measures as may advance the interests of the people, coming as its members do directly from the people and of them they know the course of trade, the manner in which the great internal commerce of the State is conducted and by what instrumentalities, and how, by them, the producing and other interests of the State are affected.

These it must be conceeded are all fit subjects for legistative consideration and independant of any constitutional provision they would
38 have an undoubted right, knowing that a large proportion of our cereals to reach the markets of the world were compelled to pass through certain warehouses called elevators and subjected to such charges as their owners might see fit to impose; to take up this whole subject as one legitimately within their domain, and if in their examination of it they find the owners & managers of these warehouses are one organized body of monopolists, possessing sufficient strength in their combination, and by their connection with the railroads of the State to impose their own terms upon the producers and shippers of these cereals to the great detriment of the latter, who are under a kind of moral duress in resorting to them. Can it be said to be an usurpation of the powers on the part of the legislature to bring them in subjection to laws so as to regulate their conduct and charges by law as to prevent oppression and extortion? Can there be a more legitimate subject for the action of a legislative body? We think not. Shall it
39 be said an interest so vast as this is does not deserve govermental care and is not a proper subject of some kind of govermental control?

And if, in the means provided by the legislature to that end, some reduction in their monthly or annual receipts may be the result, can it be said the owners are thereby deprived of their property. In the case so much relied on, supra, it was admitted it was not sufficient, the law might impair the value of the property in ever so great a degree as that destroys no rights—does not deprive the owner of any right of property. All regulations of trade, with a view to the public interest, may, more or less, impair the value of property, but they do not come within the

constitutional inhibition unless they virtually take away and destroy those rights in which property consists. This destruction must be, for all substantial purposes, total. By the law under consideration no right of property is taken away or destroyed. All the property the owners ever possessed in this business remains to them un-
40 touched by the strong hand of legislative power. The law must be held to be an honest effort, on the part of the legislature, to arrest a great and growing evil by regulating the charges which these warehouses shall demand, and placing them under bonds that they will not violate its provisions.

Great stress is laid on the fact that this warehouse was erected in 1862, long anterior to the passage of the law, and by this kind of legislation the alternative is presented, either to abandon the use of the property for which it was fitted, or to do business for a less compensation than its owners had theretofore and always received.

In another part of their argument they say that they, by consent of their customers, have received, during the past year, higher rates of storage than those specified in the act; and so, in this respect, the act is a plain, palpable violation of the clause of the constitution relied on, that depriving them of the value of the use is depriving them of
41 their property. This argument is answered by what we have already said. It is idle to talk about the consent of their customers to higher rates of charges than this law allows them to receive. Their customers, before this law was enacted, had no protection against these monopolists; they had no consent to give; they were obliged to have their grain taken to these warehouses, and be subjected to such charges as the organized combination, shutting out all competition, might choose to demand. The producer and shipper had no alternative but submission.

They were completely in the power of this combination, and it did not fail to demand and exact the highest charges.

It is this state of things the law is designed to remedy. One of the first and most imperative duties of the law-making power is to enact all necessary laws to remedy existing evils, taking care, in so doing, not to transgress any constitutional limitation. The means by which to do it most effectually, is in the discretion of the legislature, keeping
42 in view the provisions of the organic law. This law in no respect affects the title, possession, or use of this warehouse by the plaintiffs in error. It deprives them of nothing they owned and possessed at the time of its enactment. Anticipated profits are not and cannot be held and regarded as property, in the ownership or possession of him who owns the article, and of which profits are expected to flow.

The property is one thing and remains untouched, the profits are not in esse, and cannot be claimed as property. When it is said one is deprived of his property, the understanding is, it has been taken away from him, he is divested of title and possession. This provision in the bill of rights has never been so construed by the courts of any State whose constitution has such a provision as to deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of property. Ever since the organization of our State government, the legislature has exercised this power unquestioned. Fa-
43 miliar instances are found in regulating public ferries and public mills, and fixing the compensation in the shape of toll. Another is in delegating power to municipal bodies to regulate charges of hackmen and draymen, and the weight and price of bread. But in a property the most eagerly sought after by nearly all classes of community,

and deemed the most valuable of any, as it controls all others, the legislative power of every State in the Union has been prompt to bear upon it, and no court has ever questioned the *the* right so to do. We allude to the interest laws; laws declaring at what rate a man may loan his money. The argument usesd here, it seems to us, would prove all these *these* laws unconstitutional, for they do regulate the use of a man's property; they do fix a value upon its use; and as all observation shows in most localities greatly below its market-value. It may be answered such has ever been the policy of States, and such legislation has been so universal and continuous as to have familiarized the people to it and who have adapted their business to its requirements. But here
44 they say we were in this business when it was free and unrestricted, and this new policy abridges our gains. It was rightful, they say, to engage in this business and so to employ our capital that we may make the largest gains out it. The interest on money loaned is by law six per cent., with the right to contract for ten per cent., and such has been the law for a long series of years. Under the cover of that law, capitalists have engaged in loaning money at those rates. Some, on the strength of it, have erected costly buildings of granite and marble in which to transact their vast business, surrounded by a corps of clerks and other officials to whom high salaries are paid. Will anybody deny after this banker has completed his structure and arranged everything in profitable working order, that the general assembly may declare by law that after the passage of the law, the legal rate of interest shall be four per cent., and it shall be extortion to contract for more than six p'r cent., and a violation of the law, to be punished
45 by fine or imprisonment, or both, in the discretion of the court. Would the money-lender have any right to complain; would his appeal to this clause in the bill of rights be listened to for a single moment? Would any court in christiandom condemn such an enactment as unwarranted by the fundamental law? The use of money is a matter of the greatest public concern, and that it may be regulated by law has never been authoritatively denied. Kindred subjects, such as public warehouses, public mills, the weight and price of bread, and public ferries are so connected with the public welfare that a government destitute of the power to regulate them, to impose such restrictions upon them as may be deemed necessary to promote the greatest good of the greatest number would be but the shadow of a government, whose blazonry might well be "the cap and bells" and a pointless spear.

We have not remarked upon article 13, under which this law is supposes to have its efficacy, for the reason we hold the law as effect-
46 ual for all purposes contemplated by it, and as valid without as with this article; the article itself seems out of place in an organic law, but the convention, however incongruous it may appear, had, undoubtedly the right to put it there.

That body could not withstand the appeals that went up to them from the producers & shippers of the great and indispensable wants of man and forming the most valuable portion of our staple productions, to provide some remedy against the aggression and extortions to which they were subjected by this organized combination of monopolists, already such a formidable power, with but one heart, and that palpitating for excessive gains. We place the right to legislate on this subject upon that power—call it by what name you will—inherent in every organized civil government.

Every sovereign power possesses inherently unlimited legislative

power when the organic law imposes no restraints. The power to
47 legislate on all subject' effecting the interests of a whole community must be conceded to exist, and it will not cease to exist until civil government shall be resolved into its original elements. We have nothing to do with the policy of this enactment. That was a question exclusively within the jurisdiction of the general assembly which, under no circumstances, has the judicial department a right to question or arraign. We think what we have said disposes of the other point made by plaintiffs in error, arraigning the law as violative of section 13 of article 21. There is no taking or damaging private property here and devoting it to public use. It is an expression of the will of the people, through their representatives in the general assembly, that these seats of oppression and extortion shall be brought into subjection to the great relief of the people. We are of opinion the law is a valid, constitutional enactment, and affirm the judgment; and so believing, affirm the judgment of the criminal court.

WAKKER, *J.*:

I concur in this decision, for reasons stated in a substituted, separate opinion.

48 IRA Y. MUNN AND GEORGE L. SCOTT *vs.* THE PEOPLE OF THE STATE OF ILLINOIS. } No. 18. P. D. Error to the criminal court of Cook County.

Dissenting opinion by McAllister, J.—Filed January 30th, 1874.

In 1862, Munn and Scott, the plaintiffs in error, having leased premises for the purpose, as a mere private enterprise, erected thereon the warehouse described in the information, in which to store grain for hire. They then commenced the business of warehousemen, which was continued down to the commencement of this prosecution, for carrying it on, without a license from the circuit court of Cook County so to do.

It is not disputed that for the nine years they carried on the business before July 1, 1871, when the act in question went into force, they held title to the premises and exercised their employment in accordance with the law of the land, and it is not pretended that they did so un-
49 der any grant of the legislature, in the nature of a franchise or privilege. Their property was private property, their business was wholly a private enterprise, and their rights in both, were necessarily the rights of private property. These propositions cannot be successfully controverted. On account of the views expressed by my brethren and the conclusion arrived at, it becomes necessary to examine the questions involved in this case, upon elementary grounds. All consideration of a franchise being excluded from the case, the matter, so far as it relates to the nature of their rights, may be regarded precisely the same as in the case of any individual insisting upon constitutional protection, for rights of private property. The natural rights of individuals are antecedent to, and exist independently of the constitution. It is the office of the latter to secure, not to create or bestow them. Therefore the extent of constitutional protection can only be determined by a correct definition of the rights it was intended to secure. For that purpose I shall rely upon one authority alone, as none can question it. Chancellor Kent says, "The absolute rights of individuals may be resolved into the right of personal security, the right of personal
50 liberty, and the right to acquire and enjoy property; these rights

have been justly considered and frequently declared by the people of this country to be natural, inherent, and unalienable." (1 Kent's Com., Comstock's Ed., 587.) Again on the same page he says, "Right itself in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits prescribed by law." These plaintiffs in error, it must be conceded, had a natural inherent right to acquire the leasehold estate, to erect the warehouse upon it, and employ the same in the business of storing grain for reasonable reward or hire; and, when the act in question went into force, that right was a vested one, as was said by Chase J., in Calder v. Bull, 3 Dallas, 394. "When I say a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land," and again, "If any one has a right to property, such right is a perfect and exclusive right."

It is to secure these rights that governments are instituted. I cannot stop to give even a brief account of the developement or the
51 definition of the natural rights of individuals as recognized by the common law long before the American Revolution, or how the words of Magna Charta became fundamental in all our State governments and incorperated into the Constitution of the United States. I am considering a question now solely under the constitution of this State, the very first section of which, after enumerating the rights of personal security and personal liberty, declares: "To secure these rights and the protection of property, governments are instituted among men," etc. Then the next section embodies the great fundamental declaration of Magna Charta, that "no person shall be deprived of life, liberty, or property, without due process of law." Here, it will be perceived, are three subjects, each expressed by a single word and the words taken together answering to and covering the three absolute natural rights, viz, the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. It will be further perceived that the right of property is placed upon the same footing as the rights of personal security and liberty, and why, in point of reason and
52 philosophy, should this not be so? It must be admitted that the sense of property is deeply implanted in human nature—is inherent in man—and if we are to infer a purpose from results, this sense must have been bestowed for the purpose of rousing mankind from sloth and stimulating them to activity; and has, in fact, had far greater influence in founding civil governments upon correct principles than any other motive or perception of the human mind. In the elegant and comprehensive language of Kent, "the natural and active sense of property pervades the foundations of social improvements. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections."

Such being the beneficent influence of the natural sense property, in forming and animating all the institutions of a true civilization, the right to its gratification within the limits of law was regarded as an
53 absolute, natural, inherent right by the founders of the common law, is included in the fundamental doctrines of the Declaration of Independence as among the inalienable rights of man, and there denominated as the right to the pursuit of happiness, and in the bills of rights in American governments, it is placed upon an equality with the great natural rights of personal security and personal liberty.

It seems to me palpable that the views of the majority of the court

narrow this right below its proper measure. They hold that if their private property is not taken, if the title to it is not disturbed by the act in question, then these parties cannot be considered as being thereby deprived of their property within the meaning of the constitutional inhibition. This seems to me an erroneous view. The bill of rights, as I have said, does not create or bestow these natural rights, and has no reference to remedies between man and man, but was intended for the protection of the citizen as against the agencies of the Government itself, and
54 that protection was intended to be as broad as the rights protected. The right under consideration is not only to acquire but to enjoy property. Our Government is one of the people, and its functions subject to disturbance by popular excitement, by which one class of men, with certain particular interests or prejudices, either political or otherwise, may come into power, displace all against whom these prejudices run, and oppress them with unfriendly legislation. Suppose the displaced class to be those engaged in agriculture, then laws are passed designed to cripple the interest of those engaged in it. The price of laborers or employees is fixed at a high rate, and maximum prices for all products at low rates. By and by this oppressed class come into power, and they retaliate by singling out the large cities; they prescribe the rates of insurance, a standard for rents; prescribe a schedule of charges for commission-merchants, hotel-keepers, proprietors of newspapers, and, above all, maximum low prices for all implements used by the dominant class. Now, in none of these instances would prop-
55 erty itself be taken or the title to it disturbed. But can there be any doubt that, by the principle of the bill of rights, all such legislation would be unconstitutional and void? It *was* for the prevention of such things that constitutions are adopted. "When the Government," says Cooley, "through its established agencies, interferes with the title to one's property or the independent enjoyment of it, and its act is called in question, as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system, and not by any rules that pertain to forms of proceedure merely." Cooley Cons. Lim., 356.

Having given this exposition of the nature and extent of the rights of property which the bill of rights was intended to secure against the agencies of the Government, let us see whether such rights were unconstitutionally invaded by the act in question. Before proceeding to that inquiry, it is proper to state that there is no question arising which
56 has any reference to the power of eminent domain or taxation. The act singles out from all the establishments of the State of a similar character the grain warehouses in Chicago; it arbitrarily fixes the maximum rates of hire or reward to be received by the proprietors, and forbids them from contracting with customers for any higher rate. It then prohibits, under severe penalties, the continuance of the business unless they shall first apply for and obtain a license to carry it on from the circuit court of the county, in the manner prescribed, and enter into bond, with sureties to be approved by such court, in the penal sum of ten thousand dollars, conditioned for a full and unreserved compliance with all laws of the State respecting their business, including, of course, that fixing the maximum rate of hire or reward; for breach of which their license may be revoked, their business made criminal and stopped, and themselves and sureties liable on their bonds. As was justly said by Mr. Justice Johnson in the Supreme Court of the United States: "Licensing acts, in fact, in legislation are universally re-

straining acts; as for example, acts licensing gaming-houses, retailers of spirit'ous liquors, &c.," (Gibbons *v.* Ogden, 9 Wheat., 202.)

The proposition is, it seems to me, too plain for argument, that the nature of power over the business of warehousemen of grain in the city of Chicago here assumed by the State is one of suppression—of destruction; for if the legislature can fix the rate of compensation, then make it criminal to prosecute the business unless they shall obtain a license to carry it on, and give the bond required to submit to the rate so fixed, then the power is limited only by the pleasure of the State, and it may fix the rate of compensation so low that the business cannot possibly be continued under it, and is therefore suppressed—destroyed. This is purely a question of power. "Questions of power," says Chief Justice Marshall, "do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (Brown vs. The State of Maryland, 12 Wheat., 439.)

This principle was illustrated in the case of McCaulloch v. State of Maryland, 4 Wheat., 316, where it was not claimed that the particular tax levied by the State upon the United States Bank would destroy, or even embarrass, that institution. But the validity of the act was assailed wholly upon the nature of the power involved in it; and the central idea of Chief Justice Marshall's opinion was that a power to take was a power to tax, limited only by the pleasure of the State, and that it was thereupon a power to destroy. So here the power to fix the maximum rates of compensation and make the continuance of the business criminal unless the parties will submit to such rates, procure license, and give the bond—a power whose exercise is limited only by the pleasure of the State as to what that rate shall be—is necessarily a power to destroy a business which had been carried on for nine years according to the law of the land, and in which these parties had vested rights. I insist that they could not be deprived of these rights except by due process of law. The legislature had no more power to accomplish the destruction of such business, and deprive them of the use of their property by such indirect modes, than by a direct fiat to require the sheriff of the county to burn their warehouse. The majority of the court seem to place their conclusion in part upon the ground that these parties exercised a public employment, and were therefore subject to the police power of the State. We had occasion, in The Town of Lake View v. Rose Hill Cemetery, Sept. T., 1873, to examine somewhat into the nature of that power, when resorted to as a color for subverting private rights of property, and there held that it could not be invoked to sustain legislation which invaded private rights, where the police power was but a mere color for such invasion. But these parties did not exercise a public employment. Such was not the character given to their business by the common law. In Coggs v. Bernard, 2 Ld. Raym., the leading case on the subject of bailment, Chief Justice Holt, in his celebrated judgment, says: "As to the fifth sort of bailment, viz, a delivery to carry or otherwise manage for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First. If it be to a person of the first sort, and he is to have a reward, he is bound to answer at all events; and this is the case of the common carrier, common hoyman, master of a ship," etc. This degree of liability, viz, to answer at all events, attaches by the common law in this country only to common carriers and inn-keepers.

It does not attach to warehousemen. Hence we find that Mr. Justice Story, in classifying bailments locatio custodiæ, or deposits for hire, puts agisters of cattle, warehousemen, and wharfingers together as those whose obligations would fall under the same rule. (Story on Bailment, 8 ed., sec. 442.) Warehousemen are bound only to take common and reasonable care of the commodities entrusted to their charge, (id., sec. 444,) while common carriers and inn-keepers are insurers, because they exercise a public employment. Their business was, therefore,
61 simply that of warehousemen. Such was the character given to it by the common law, and in which they had vested rights for nine years anterior to this act. This being so, it was not within the power of the State government, by any declaration, either through a constitutional amendment or the legislature, to change the character of such business so as to subject it to legislative control in the nature of a power of suppression. Because a convention is assembled to amend the constitution, no individual is thereby subject to be deprived of vested rights. The great fundamental principles of a republican form of government continue in force during such conventions, and are not superseded by an amendment of the constitution. Besides, the constitution, as amended by the introduction of the article concerning warehouse, in nowise contemplated or authorized the assertion of the power of suppression.

But there is another view, in which it is clear the legislature transcended its power by this act. The Chicago River, running west
62 from its connection with Lake Michigan about a mile, and then dividing into two branches, one north and the other south, running through the city, form the port of Chicago. The warehouse in question, and probably all others at which this statute was aimed, are situated upon this port, and constitute the direct and indispensable accessories to commerce in grain upon the great lakes between that port and other States, and the question arises, can these accessories to such commerce be suppressed by the State government? The States have ceded, by express grant in the Federal Constitution, to the government thereby organized the power "to regulate commerce with foreign nations & among the several States." The power, therefore, to regulate inter-State commerce is gone from the several States and vested exclusively in Congress, especially after it has been exercised by the latter. (Gibbons v. Ogden, 9 Wheat., 1; Steamboat Co. v. Livingston, 3 Cow. R., 743; Thurber v. The People, 13 Ill., 535; 5 Howard R., 573.

The power to regulate commerce upon the great lakes has long
63 since been exercised by Congress. If these grain-warehouses be, in fact, as doubtless they are, the direct and indispensable accessories to commerce in grain upon the lakes and between the port of Chicago and ports in other States, will it be said that this State can exert a power over them whose very nature is that of suppression—of destruction? Can the State, by her legislative authority, suppress all commerce in grain upon the lakes between Chicago and the Eastern States, when not necessary to the preservation of the morals, health, or safety of the community? If not, then how can it restrain and destroy the very means by which alone that commerce may be carried on with the conveniences suitable to the activity of the age? This power in Congress to regulate commerce among the several States is contained in the same grant as that to regulate it with foreign nations, and is placed upon identically the same footing. Now, suppose the legislature of New York should pass an act like this, designed and directed against

all warehouses in the city of New York engaged in receiving, storing, and discharging all commodities, whether imports or exports,
64 brought within the channels of such commerce. These warehouses, it must be conceded, are as directly employed in that commerce, and as indispensable to it, as the vessels upon which it is borne from port to port. The act, it will be perceived, operates directly upon the entire business of warehousemen: The component parts of that business are various transactions, in which the carrier and the merchants engaged in such commerce, as well as the warehousemen, are directly interested. So far, therefore, as it operates upon the business, it must upon all these various transactions forming its component parts, and it prescribes rules by which they must be governed, or cease altogether. This could be nothing more nor less than an attempt to regulate foreign commerce, as a direct exercise of such power, without reference to any police power. The act was not necessary to the preservation of the health, the morals, or the safety of the community, which are the true purposes of the police power; but its purpose was to compel the warehousemen to conduct their business upon a compensation prescribed by the State. As was said by Mr. Justice McLean, in
65 5 Howard, 592: "Under the pretence of a police regulation, a State cannot counteract the commercial power of Congress." It seems to me the cases are parallel and the act void.

SCOTT, *J.*

I cannot concur in the reasoning or conclusions of the majority of the court, but do concur in the views presented by Mr. Justice McAllister, in his dissenting opinion.

66 In vacation after Sept. term, A. D. 1873, January 30th, A. D. 1874.

IRA Y. MUNN AND GEORGE L. SCOTT *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.	}	No. 18, P. D. Error to criminal court of Cook County.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective, and that that record is no error; therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said defend-
67 ants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution thereof.

STATE OF ILLINOIS, *ss:*

I, Cairo D. Trimble, clerk of the supreme court in and for the northern grand division of the State of Illinois, do hereby certify the above and foregoing to be a true, full, and complete copy of the record and proceedings in a certain cause entitled, in this court, Ira Y. Munn and George L. Scott, plaintiffs in error, against The People of the State of Illinois, defendants in error.

Witness my hand and the seal of said supreme court, at Ottawa, in said State, this 23rd day of September, A. D. 1874.

[SEAL.] C. D. TRIMBLE, *Clerk.*

68 Supreme court of Illinois, northern grand division, September term, A. D. 1874.

IRA Y. MUNN AND GEORGE L. SCOTT, PLFFS. in error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, defts. in error.
} Error to the criminal court of Cook County.

I do hereby certify that in the above-named case there was drawn in question the validity of the statute of the State of Illinois entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article XIII of the constitution of this State," approved April 25th, 1871, on the ground that it is repugnant to the fourth clause of the eighth section of article one (I) of the Constitution of the United States, and also to article five (V)
69 and also to article fourteen (XIV) of the amendments of the Constitution of the United States; and that the decision of the court was in favor of the validity of said statute, and that the rights of the plaintiffs in error in said case depended upon the validity or invalidity of said statute, and that the decision of the court was adverse to the rights claimed by said plaintiffs in error; that the judgment in said case is final, and was rendered by the highest court of the State of Illinois having jurisdiction of the controversy; and application having been made to the chief-justice of the supreme court of Illinois by the plaintiffs in error that a writ of error may be allowed to issue from the Supreme Court of the United States directed to the supreme court of Illinois, for the purpose of causing the record and proceedings in said case to be sent to the said Supreme Court of the United States:

70 It is ordered that said writ of error be allowed to issue.

Sept. 28, 1874.

P. H. WALKER,
Chief-Justice of the Supreme Court of Illinois.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ira Y. Munn and George L. Scott, plaintiffs in error, and The People of the State of Illinois, defendants in error, wherein was drawn in question the validity of the statute of the State of Illinois entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article XIII of the constitution of this
72 State," approved April 25th, 1871, on the ground that it is repugnant to the fourth clause of the eighth section of article one (I) of the Constitution of the United States, and also to article five (V) and also to article fourteen (XIV) of the amendments of the Constitution of the United States, and the decision of the court was in favor of the validity of said statute, and the rights of said plaintiffs in error de-

pended upon the validity or invalidity of said statute, and the decision was adverse to the rights claimed by said plaintiffs in error, a manifest error hath happened, to the great damage of the said Ira Y. Munn and George L. Scott, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly
73 and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the thirtieth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

74 UNITED STATES OF AMERICA, *ss:*

To the people of the State of Illinois, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Illinois, northern grand division, wherein Ira Y. Munn and George L. Scott are plaintiffs in error and you are defendant' in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

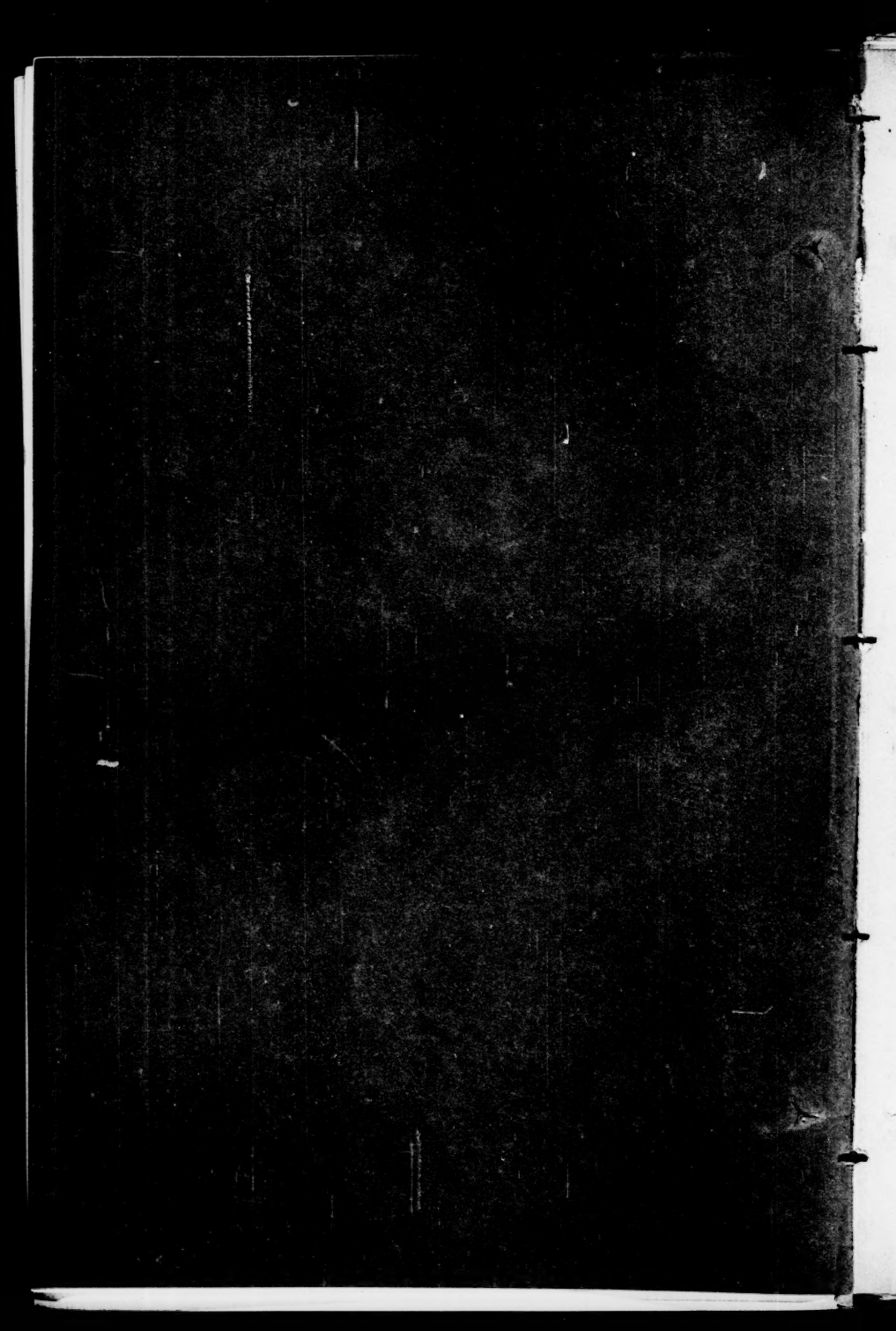
Witness Pinkney H. Walker, chief-justice of the supreme court of Illinois, this thirtieth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

P. H. WALKER,
Ch. J. Supr. Court Ill.

75 I hereby accept service of the within citation this second day of October, A. D. 1874.

CHARLES H. REED,
State's Attorney, Attorney for The People of the State of Illinois.

(Indorsement on cover:) No. 557. Ira Y. Munn and George L. Scott, plaintiffs in error, vs. The People of the State of Illinois. Illinois sup. court. Filed 7th October, 1874.



Supreme Court of the United States.

OCTOBER TERM, A. D. 1874.

IRA Y. MUNN and GEORGE L. SCOTT,
Plaintiffs in Error,

v.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.

BRIEF AND ARGUMENT.

W. C. GOUDY,
For Plaintiffs in Error.

CHICAGO:
BULLETIN PRINT. CO., 132, 134 AND 136 MONROE STREET, COR. CLARK.
1874.

Supreme Court of the United States.

OCTOBER TERM. A. D. 1874.

IRA Y. MUNN and GEORGE L. SCOTT,
Plaintiffs in Error,
v.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

Error to the Supreme Court of Illinois.

I.

STATEMENT OF THE CASE.

1. *Constitution of Illinois.*

Section XIII of the Constitution of the State of Illinois, which went into force August 8th, 1870, so far as material for the decision of this case, is as follows, to wit:

"WAREHOUSES.

"§ 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

"§ 2. The owner, lessee, or manager of each public warehouse situated in any town or city of not less than one hundred thousand inhabitants, shall make weekly statements under oath, before some officer to be designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots, shall not be mixed with inferior or superior grades without the consent of the owner or consignee thereof.

* * * * * * * * *

"§ 6. It shall be the duty of the General Assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the constitution which shall be liberally construed so as to protect producers and shippers. And the enumeration of the remedies herein named, shall not be construed to deny to the General Assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common law remedies.

"§ 7. The General Assembly shall pass laws for the inspection of grain, for the protection of producers and receivers of grain and produce."

NOTE.—Of this Article, § 3 declares that the owners of property stored shall be at liberty to examine the property and books of the warehouse; § 4, that railroad companies and common carriers on railroads shall weigh or measure grain and receipt for it at the place of shipment, and be responsible for the delivery of the full amount at the place of delivery; § 5, that all railroad companies shall deliver grain in bulk to any consignee or elevator, to which it may be consigned, provided it can be reached by any track used, or which can be used by any railroad companies; and all railroad companies shall permit connections to be made, so that any such companies, or public warehouse, or coal bank, or coal yard may be reached by the cars on said railroad.

2. *Statute of Illinois.*

The General Assembly of Illinois passed an act, which was approved April 25, 1871. The material parts are as follows:

"An Act to regulate Public Warehouses, and the warehousing and inspection of grain, and to give effect to Article Thirteen of the Constitution of this State.

"§ 1. Public warehouses, as defined in Article Thirteen of the Constitution of this State, shall be divided into three classes, to be designated as classes A, B and C, respectively.

"§ 2. Public warehouses of class A shall embrace all warehouses, elevators or granaries, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators or granaries being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property or any kind is stored for a consideration.

"§ 3. The proprietor, lessee or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the Circuit court of the county in which such warehouse is situated, a license permitting such proprietor, lessee, or manager to transact business as a public warehouseman, under the laws of this State, which license shall be issued by the clerk of said court upon a written application, which shall set forth the location and name of such warehouse, and the individual name of each person interested as owner or principal in the management of the same; or, if the warehouse be owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated; and the said license shall give authority to carry on and conduct the business of a public warehouse of class A in accordance with the laws of the State, and shall be revocable by the said court upon a summary proceeding before the court, upon complaint of any person, in writing, setting forth the particular violation of law, and, upon satisfactory proof, to be taken in such manner as may be directed by the court.

"§ 4. The person receiving a license as herein provided, shall file with the clerk of the court granting the same, a bond to 'the People of the State of Illinois,' with a good and sufficient surety, to be approved by said court, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman of class A, and his full and unreserved compliance with the laws of this State in relation thereto.

"§ 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein provided, or who shall continue to transact any such business after such license has been revoked (save only that he

may be permitted to deliver property previously stored in such warehouse), shall, on conviction, be fined a sum of not less than one hundred dollars nor more than five hundred dollars, for each and every day such business is so carried on; and the court may refuse to renew any license, or grant a new one, to any of the persons whose license has been revoked, within one year from the time the same was revoked."

§ 6. Requires every warehouseman of class A to receive all grain tendered for storage, if he has room, prohibits the mixing of different grades, and authorizes grain to be stored in a separate bin by agreement of the owner and warehouseman.

§§ 7–12. Require the warehouseman of class A to give a receipt to the owner or consignee, subject to the order of the owner or consignee, and regulate the issuance, form, and cancellation of such receipts, and the delivery of the property stored.

§ 12. Requires every warehouseman of class A to make weekly statements of the amount and kind of grain stored at the close of business on the previous Saturday, which was to be verified by oath and given to the warehouse registrar, an officer created by the act, and to post a similar statement in a conspicuous place in the office of the warehouse; and also to furnish daily to the registrar a correct statement of the grain received, in store, and delivered, and in regard to all receipts issued, outstanding, or canceled.

§ 13. Fixes the grades of grain.

§ 14. Provides for the appointment of chief inspector of grain by the governor, to have supervision of the inspection of grain under the direction of the Board of Railroad and Warehouse Commissioners; for assistant inspectors, and defines and regulates their duties.

"§ 15. Every warehouseman of public warehouses of class A, shall be required, during the first week in January of each year, to publish in one or more of the newspapers (daily if there be such), published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in his warehouse during the ensuing year, which rates shall not be increased (except as provided for in § 16 of this act), during the year; and such published rates, or any published reduction of them, shall apply to all grain received into such warehouse from any person or source, and no discrimination shall be made, directly or indirectly, for or against any charges made by such warehouseman for the storage of grain.

The maximum for storage and handling grain, including the cost of receiving and delivering, shall be, for the first thirty days, or part thereof, two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one cent per bushel."

§§ 16–23. Regulate the duties of warehousemen as to property stored, and make penalties in regard to inspection, and against the unlawful agreement to divert grain contrary to the direction of the owner or consignee.

§ 23. Authorizes a suit in behalf of any person injured by a violation of the act, upon the bond, in the name of the people; and makes it the duty of the State's attorney to prosecute all criminal proceedings for a violation.

§ 24. Makes the receipts negotiable.

§ 25. Provides punishment by imprisonment in the penitentiary for a fraudulent issue of a warehouse receipt, or a removal of any property stored without a surrender of the receipt.

§ 26. Preserves all common law remedies.

§ 27. Requires the proprietors and managers of public warehouses to keep posted in a conspicuous place, in their offices, a copy of the act.

§ 28. Repeals all acts and parts of acts inconsistent with this act.

3. *Prosecution for transacting business without procuring a license.*

On the 29th day of June, 1872, the State's Attorney filed an information in the Criminal court of Cook county, Illinois, against Ira Y. Munn and George L. Scott, in which it was alleged that they were, on the 28th day of June, 1872, in the city of Chicago, in Cook county, Illinois, the managers and lessees of a public warehouse, known as the "Northwestern Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen as aforesaid, without procuring a license from the Circuit court of said county, permitting them to transact business as public warehousemen, under the laws of the State of Illinois. Rec., 1–2.

To this information a plea of not guilty was interposed, and upon a trial of the issue, the defendants were found guilty, and a fine of $100 imposed. Rec., 3.

The evidence was embraced in an agreed statement of

facts, which was made a part of the record, which is to be found in this Record, pages 4–7, inclusive.

By that stipulation it appears that Munn & Scott leased the ground occupied by the Northwestern Elevator of the owner in 1862, and in that year, with their own capital and means, erected thereon the grain warehouse or elevator, and that they have ever since carried on, in said elevator, the business of receiving, storing and handling grain for hire, for which they have charged and received, as a compensation, such rates of storage as have been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.

It further appears, by the stipulation, that on the 28th day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The Northwestern Elevator" in Chicago, Illinois, wherein grain of different owners was stored in bulk and mixed together, and that they, then and there, carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit court of Cook county, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit court a bond to the people of the state of Illinois, as required by §§ 3 and 4 of the act of the Legislature, approved April 25, 1871; and that the city of Chicago then, and for more than two years before, had more than 100,000 inhabitants.

It further appeared, from the stipulation, that the plaintiffs in error had stored and mixed grain of different owners togeth-

er, only by and with the express consent and permission of such owners, and that they also agreed that the compensation should be the published rates of storage.

It further appeared that the plaintiffs in error had complied in all respects with the act of the legislature, except in two particulars: *first*, they had not taken out a license, nor given a bond, as required by sections 3 and 4; and *second*, they had charged for storage and handling grain, the rates established and published in January, 1872, which were higher than those fixed by § 15.

Munn & Scott prosecuted a writ of error from the Supreme court of Illinois, and a transcript of the record was filed therein September 11, 1872. Rec., 1.

Errors were assigned. Rec., 8.

On the 30th day of January, 1874, the Supreme court of Illinois affirmed the judgment of the Criminal court of Cook county. Rec., 22.

At the September term, 1874, a certificate was granted by the Chief Justice of the Supreme court of Illinois, that in this case there was drawn in question the validity of the statute of Illinois, entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article XIII of the constitution of this State," approved April 25th, 1871, on the ground that it was repugnant to the third clause of the eighth section of Article I of the constitution of the United States, and also to Article V, and also to Article XIV of the amendments to the constitution of the United States; and that the decision of the court was in favor of the validity of said statute; and that the rights of the plaintiffs in error depended upon the validity or invalidity of the statute, and the decis-

ion was adverse to the rights claimed by the plaintiffs in error; that the judgment was final, and rendered by the highest court in the State of Illinois, having jurisdiction of the controversy, and a writ of error was allowed. Rec., 23.

A writ of error was issued, and a citation was served, Oct. 2d, 1874. Rec., 23, 24.

4. *Facts of which the court will take judicial notice.*

FIRST.—*Geography.*

The harbor of Chicago is the Chicago river and its North and South Branches. The city is built on the west shore of Lake Michigan, near the south end, upon the banks of these rivers, and here is the extreme southwestern port for the commerce of the great lakes. The Illinois, Mississippi and Missouri rivers and their tributaries are connected with the lakes by means of the Chicago river and the Illinois & Michigan Canal The *termini* of the trunk lines of railway transporting freight and passengers from Wisconsin, Minnesota, Iowa, Nebraska, Kansas, Illinois, and the Western Territories are at Chicago. The great trunk lines of railway connecting the country in the northern Mississippi valley with the Atlantic coast and the exporting ports, find their western *termini* at Chicago.

The warehouses of the railway lines are situated on or near the banks of the Chicago river. The warehouses for handling grain are located on the banks of the Chicago river, so that a railroad track is on one side and the river on the other.

The river and its branches furnish docks for the landing of boats and vessels, and loading and unloading freight, of more than twenty-five miles, and these are lined with places for storage or for the transfer, from car to vessel or *vice versa*, of the articles of trade.

SECOND.—*Course of transportation and the usages and customs of trade.*

The great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard, by the great lakes, and some of it is forwarded by railway to the Eastern ports. When the grain reaches the Atlantic cities it is sold for consumption or shipped to foreign countries. Vessels, to some extent are loaded in the Chicago harbor and sailed through the St. Lawrence, directly to Europe.

Comparatively little of the grain received in Chicago is used there; the great bulk is transferred immediately, or stored for a time and then transferred to the car or vessel for transportation eastward. The quantity received in Chicago has made it the greatest grain market in the world.

This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called *elevators*, because the grain is *elevated* from the boat or car, by machinery operated by steam, into the bins prepared for its reception; and *elevated* from the bins, by a like process, into the vessel or car, which is to carry it on.

The grain is, to a large extent, stored for a time, especially during the winter, when navigation is closed. During the time it is in store, a very large proportion is sold, first by the producer or dealer who has sent it from the place of production, and then by the dealer who sells for shipment to the Eastern States or foreign countries. In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast north of Washington, is in grain which passes through the elevators of Chicago.

In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the seashore, and forms the largest part of *inter-State commerce* in these States.

The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength; they are provided with machinery and steam engines by which the grain is received and discharged. They are located with the river harbor on one side and the railway tracks on the other, and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand.

This mode of conducting the business was inaugurated more than twenty years ago and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit. There is no known instance where it has been conducted by a corporation, or by authority from the legislature.

The "Northwestern Elevator," built by the plaintiffs in error, in 1862, and used as a grain warehouse ever since, is situated on the North Branch of the Chicago river, a short distance from its junction with the main stream, with the tracks of the

Chicago and Northwestern Railway, of the Wisconsin Division, on the other side from the river. It is used chiefly to receive grain from the railroad company which has carried the grain from Wisconsin, Minnesota, Northern Iowa and Northern Illinois, and to discharge it for shipment eastward in vessels and cars—sometimes in vessels for direct transportation to Europe.

II.

ASSIGNMENT OF ERRORS.

The plaintiffs in error say that the Supreme court of Illinois committed error to their injury and prejudice, in affirming the judgment of the Criminal court of Cook county against them, in this:

1. Sections three, four, five and fifteen of the statute passed by the legislature of Illinois, entitled "An act to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to Article XIII of the constitution of this State," approved April 25, 1871, under which the plaintiffs in error were convicted and fined, are unconstitutional and void.

2. Said sections are repugnant to the third clause of section eight, of Article I, of the constitution of the United States; and also to the sixth clause of section nine, Article I, of the constitution of the United States; and also to Article V, of the amendments to the constitution; and also to the first section of Article XIV of the amendments.

3. The Supreme court of Illinois decided erroneously said sections to be valid and not repugnant to the constitution of the United States, and erroneously affirmed the judgment of the Criminal court of Cook county.

III.

BRIEF OF THE ARGUMENT.

1. Introductory statement of the case.

Argument 1–5.

2. Preliminary propositions:

First. The plaintiffs in error could not safely take a license and give a bond as required by §§ 3 and 4 of the act, because they would thereby waive the right to question the validity of the act.

Argument 5, 6.

AUTHORITIES:

Cooley on Const. Lim., 181.
Baker v. Braman, 6 Hill, 511.
Ferguson v. Landrum, 1 Bush, Ky. 548.
Home Ins. Co. v. Security Ins. Co., 23 Wis., 171.

Second. The facts not contained in the record, of which the court take judicial notice.

Statement of Case.
Argument 7–9.

AUTHORITIES:

Vincent v. C. & A. R. R. Co., 49 Ill. 38.
Gibson v. Stevens, 8 How. 399.
Smith v. N. Y. C. R. R. Co. 43 Barb. 225.
Bronson v. Wiman, 4 Selden, 182.
Duncan v. Littel, 2 Bibb. 426.

Bell's Heirs v. Barnet, 2 J. J. Marsh, 520.
Boulimet v. State, 28 Ala. 88.
The Mersey, Blachford's Prize Cases, 191.
Waring v. Mayor, 8 Wal. 115.

I.

The 3d, 4th, 5th and 15th sections of the Illinois statute, under which the plaintiffs in error were convicted and fined, are repugnant to the 3d clause, § 8, Article I of the constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States.

Argument 9–26.

1. This court has jurisdiction under § 25 of the judiciary act.

Argument 11.

AUTHORITY:

Ward v. Maryland, 12 Wal. 423.

2. The business of the plaintiffs in error, as warehousemen of grain in bulk in elevators, is covered by the word *commerce*.

Argument 11, 12.

AUTHORITY:

Case of the State Freight Tax, 15 Wal. 275.

3. The business is a part of the inter-State and foreign commerce of the country.

Argument 13.

AUTHORITY:

State Freight Tax, 15 Wal. 276, 277.

4. The act of the Illinois legislature is a regulation of commerce.

Argument 14.

5. The power asserted by the Illinois legislature, is one of restraint as well as regulation of commerce.

Argument 15.

AUTHORITIES:

Gibbons v. Ogden, 9 Wheat. 232.
Brown v. Maryland, 12 *Ib.* 448, 439.
Osborne v. Mobile, 16 Wal. 481.
Woodruff v. Parham, 8 Wal. 138.
State Freight Tax, 15 Wal. 276.

6. The State has not concurrent power with Congress to enact the provisions in question.

Argument 17–20.

AUTHORITIES.

Wilson v. Blackbird Marsh Co., 2 Peters 250.
Gilman v. Philadelphia, 3 Wal. 721, 730.
License Cases, 5 How. 504.
Bartmeyer v. Iowa, 18 Wal. 132.
N. Y. v. Miln, 11 Peters 102.
Gibbons v. Ogden, 9 Wheat. 222.
State Freight Tax Case, 15 Wal. 279.

7. Application of the rules of law to the facts of the case at bar.

Argument 20–25.

II.

The sections of the act of the legislature of Illinois, alleged to be void, are also repugnant to the sixth clause of

§ 9, Article I, of the constitution, which ordains that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

Argument, 25.

III.

The sections of the Act of the Illinois legislature, alleged to be void, are also repugnant to that part of the first section of Article XIV of the Amendments to the Constitution of the United States, which ordains that no State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the laws.

Argument 26.

1. The construction of the provision which protects life, liberty, and property.

Argument 28–31.

AUTHORITIES.

5 Webster's Works 487.
Coke's Inst. 46-50.
Murray's Lessee v. Hoboken Co. 18 How. 276.
Hoke v. Henderson, 4 Dev. N. C. 15.
Taylor v. Porter, 4 Hill 146.
Wynehamer v. People, 13 N. Y. 393.
Cooley on Const. Lim. 351 *et seq.*

2. This provision protects the owner in the use of his property as well as in the title and possession.

Argument 31.

AUTHORITIES :

Pumpelly v. Green Bay Co. 13 Wal. 177.

Sinnickson v. Johnson, 2 Harr. N. J. 129.

Gardner v. Newburgh, 2 John. Ch. 162.

Also, cases cited in note 13 Wal. 179.

Green v. Biddle, 8 Wheat. 1.

Bronson v. Kinzie, 1 How. 311.

Cooley on Const. Lim. 290.

Walker v. Whitehead, 16 Wal. 314.

Rowley v. Hooker, 21 Ind. 144.

Ogden v. Saunders, 12 Wheat. 259.

Willard v. Longstreet, 2 Doug. Mich. 172.

Gantly's Lessee v. Ewing 3. How. 709.

3. The police power of the State defined and discussed. The sections in question are not within the limits of that power.

Argument 34–48.

AUTHORITIES :

4 Black. Com. 162.

Bentham Edin. Ed. Part IX, 157.

Cooley on Const. Lim. 572, 577.

Thorpe v. I & M. R. R. Co. 27 Vt. 149.

Com. v. Alger, 7 Cush. 84.

2 Kent Com. 340.

People v. I. & M. R. R. Co. 9 Mich. 307.

Lake View v. Rosehill Cem. Co. 6 Chicago Legal News, 120.

Benson v. Mayor, 10 Barb. 245.

Vanderbilt v. Adams, 7 Cow. 449.

Broom's Legal Maxims, 357.

The act is not a regulation of the use of property for the future, but it deprives the plaintiffs in error of property in existence and used by them for years prior to the passage of the law.

Argument 38, 39.

AUTHORITIES:

Wynehamer v. People, 13 N. Y. 378.
Com. v. Alger, 7 Cush. 85.
Bartmeyer v. Iowa, 18 Wal. 132.

There are authorities directly in point against the exercise of such power.

Argument 39–43.

AUTHORITIES:

Cooley on Const. Lim. 393.
Doe ex dem. Gaines v. Buford, 1 Dana, 490.
Webb v. Baird, 6 Ind. 17.

The examples of legislation in regard to usury, ferries, mills, hackmen, etc., are not precedents justifying the exercise of such power.

Argument 43–48.

AUTHORITIES:

7 Bacon's Abridg. 188, Ed. 1807.
Angell on Highways, §§ 47, 48.
Birset v. Hart, Willes, 508.
Mills v. County of St. Clair, 2 Gilm. 197.
Dundy v. Chambers, 23 Ill. 369.
15 Viner's Abridg. 398.
Hix v. Gardner, Bulstrode's R. 195.

4. The sections of the act of the Illinois legislature are repugnant to the provision of the fourteenth amendment that, No State shall deny to any person, within its jurisdiction, the equal protection of the laws.

Argument 48.

AUTHORITIES:

Cooley on Const. Lim. 391.

Walley's heirs v. Kennedy, 2 Yerger, 554.

5. The provisions of the constitution of Illinois in regard to warehouses do not affect the questions.

Argument 51.

AUTHORITIES:

Railroad v. McClure, 10 Wal. 511.

Rouse v. Home of the Friendless, 8 *Ib.* 430.

Rouse v. Washington, *Ib.* 439.

IV.

ARGUMENT.

May it please your Honors:

The questions presented by this record for decision, are of the gravest character. For the first time since the Union of these States, a legislature of a State has attempted to control the property, capital and labor of a private individual, by fixing the prices he may receive from other private persons, who choose to deal with him, The plaintiffs in error claim, that such legislation is repugnant to the provisions of the constitution of the United States.

In 1862, the plaintiffs in error leased from the owner a lot, between the North Branch of the Chicago River and the tracks of the Wisconsin Division of the Chicago and Northwestern Railway, and erected thereon an elevator, for the handling and storage of grain in bulk, according to the usages of commerce. They entered into the business and have continued to carry it on ever since. The plaintiffs in error are two private individuals, partners in the business, and exercise no franchise or privilege, granted by the legislature. They embarked in this pursuit, and have used their capital and devoted their skill in the exercise of the right of liberty and property, guaranteed to them. No person was obliged to transact business with them. It was regulated solely by the mutual agreement of the parties.

After having pursued this business for eight years without interference, and while they were the owners of property

fitted only for use as an elevator and grain warehouse, a new constitution was adopted by the people of Illinois, and an article, numbered XIII was inserted, which is entitled "Warehouses." As the plaintiffs in error complied with every provision of this article, and it did not authorize the legislation in controversy, and the Supreme court of Illinois have placed its validity upon the general power of a State legislature, it is not important to analyze this provision of the Illinois constitution; it is mentioned as a historical fact only. The plaintiffs in error, still pursuing their business as before, the legislature on the 25th of April, 1871, passed an act which was to take effect July 1st, 1871, and by that act they were prohibited from further continuing their occupation, and from using their house for the only purpose it could be used, unless they obtained from the Circuit court of Cook county a license, and gave a bond in the sum of $10,000, with approved sureties, conditioned for the faithful performance of their duty as public warehousemen of class A, and for their full and unreserved compliance with all laws of the State in relation thereto. The statute did not embrace all warehousemen in the State, but only those in the city of Chicago. It did not require any fee or tax to be paid for the license, and it does not, therefore, come within that class of cases where the State has attempted to impose a tax or raise revenue.

The 15th section fixed the maximum charge for storage and handling grain, so that an observance of this regulation was one of the provisions of the laws of the State, which the bond would bind the persons who executed it to observe. The business could not be carried on without a license; the license could not be obtained without giving the bond; the charges for the use of the warehouse could not exceed the sum named in the statute without a violation of the bond and a revocation of

the license, which, by the terms of the law, prevented a continuance of the business. The plaintiffs in error were placed in this predicament on the 1st day of July, 1871. The legislature, by the same act, required them to receive all grain tendered for storage to the capacity of their house, and, in effect, made it unlawful for them to make an agreement with their customers, in regard to the compensation. The bond not only was to bind them to receive the prices fixed in this statute but to any other law which might be passed. The legislature asserted the *power* to regulate the mode of conducting the business and to fix the price to be received. This power had been exercised by the mutual agreement of the plaintiffs in error and their customers, and if it was lawfully exercised by the legislature, there was no limit, but it depended upon the legislative discretion alone. If the license was taken and the bond given, the parties could not deny the validity of the legislation. The plaintiffs in error, under these circumstances, were obliged to yield the use and control of their private property, their capital, and their labor, to the legislature of the State, or to refuse to take the license. The question was purely one of legislative control of private property, and not one of taxation, or of police regulation. They elected to manage their own property and refused the license. The consequence was a prosecution according to § 5 of the act, and a fine of $100.

The plaintiffs in error were not alone interested in the validity of the act of the legislature. The rights of their customers were involved. Citizens of foreign countries, and of Wisconsin, Minnesota, Iowa, New York, Pennsylvania, Maryland, and other States, stored their grain in the warehouse of the plaintiffs, and in other similar warehouses in Chicago, embraced within the

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The plaintiffs in error were not alone interested in the validity of the act of the legislature. The rights of their customers were involved. Citizens of foreign countries, and of Wisconsin, Minnesota, Iowa, New York, Pennsylvania, Maryland, and other States, stored their grain in the warehouse of the plaintiffs, and in other similar warehouses in Chicago, embraced within the

terms of the statute. They had paid such sums for handling and storing as they had agreed upon with the warehousemen.

The legislature had fixed a lower price than these consignees and owners of grain had paid, but it is always good policy as well as right to pay a fair price; and if the legislature could fix a low price, it could fix a high one. Therefore, to the customers of the elevators, the question was presented as to the power of the legislature of a State to determine the compensation which they should be obliged to pay for handling and storing their grain in Chicago, when sent there for sale or transportation.

It is obvious that the questions presented would be regarded as grave, and the validity of such a law would be doubted.

It will be apparent from the record that this is a test case to determine the constitutional questions involved, and it may not be improper to say, that no other judgment has been rendered, but that proceedings have been stayed to await the result of this case.

The Supreme court of Illinois affirmed the judgment of the Criminal court of Cook county, by a divided court and the opinions are printed in the record.

The plaintiffs in error bring the case to this court under §25 of the judiciary act. The range of argument is limited to the question as to whether §§3, 4, 5 and 15 of the act of the General Assembly of Illinois are repugnant to the constitution of the United States. The Supreme court of Illinois have settled all other questions.

It is claimed that these sections of the Illinois law, are repugnant to the Federal constitution in this :

First. To the provision which confers upon Congress the

power to regulate commerce with foreign nations, and among the several States.

Second. To that provision which ordains that, no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

Third. To that provision which ordains that, no State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the laws.

Before entering upon the argument of the constitutional propositions, we invite attention to other points.

1*st*. The plaintiffs in error were justified in refusing to take a license and give a bond, as required by §§ 3 and 4 of the Illinois statute, if section fifteen was unconstitutional. Because, they could not question the validity of the latter provision, if they waived their objection to the first. In addition to the condition of the bond, which would bind them to an observance of all parts of the statute, the reception of a license would be such a recognition of the law as would amount to a waiver of all objections to its constitutionality.

JUDGE COOLEY, in his work on Constitutional Limitations, page 181, says: "These are where a law in its application to a particular case must be sustained, because the party who makes the objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken

assented thereto; and that he did assent and waive the constitutional privilege, if he received the compensation awarded, or brought an action to recover it. So, if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it, all objection on the ground of unconstitutionality is removed. And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and damages assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam, and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common law trial by jury. In these and the like cases, the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacle, and lets the statute in to operate the same as if it had in terms contained the condition."

In support of this proposition, I cite:

Baker v. Braman, 6 Hill, 47.
Embury v. Conner, 3 N. Y., 511.
Ferguson v. Landram, 1 Bush (Ky.), 548.
Home Ins. Co. v. Security Ins. Co., 23 Wis., 171.

The plaintiffs in error have not, therefore, acted in a reckless and defiant manner, but they have been forced to surrender the control and use of their property and labor to the legislature, or to rely upon the legal proposition that this statute was *pro tanto void*, as they had the right at their peril to do.

2d. The court will take judicial notice of certain facts which are essential to a correct decision of this case.

It is not necessary to cite authorities to the effect that the court will use its own knowledge of the geography of the country; or of the laws of Congress and the acts of the government with reference to the commerce upon the lakes and the port of Chicago.

The court will also take notice, without proof, of the course of trade, and the general commercial usages of the country, and the world, including the manner in which the business of transportation and commerce is conducted.

The Supreme court of Illinois in *Vincent v. C. & A. R. R. Co.*, 49 Ills. 38, say: "There are some facts connected with the vast internal commerce of this State, of which, independent of any averments in the bill, we will take judicial notice. The immense quantities of grain, which are annually transported to Chicago over our lines of railways, making that city, with the aid of contributions from neighboring States, one of the great grain markets of the world, are chiefly sent in bulk. The grain is ordinarily consigned to commission merchants, who have erected vast warehouses, termed elevators, connected by side tracks with the main line of some railway, and provided with machinery for the rapid unloading of the cars, and storage of the grain. As the grain is of various grades and prices, it is of great importance to the agricultural and mercantile interests of the State that each shipment of grain should be stored by itself, or with grain of the same grade, and that every shipper should be able to select his own consignee, with the certainty that, if his elevator is on the line of the road by which the grain is transported, and the consignee is ready to receive the shipment, it shall be faithfully delivered to

him. This arrangement is as advantageous to the railways as to the consignor and consignee. It would obviously be impossible for the companies to unload and store this grain at their ordinary freight depots, to be there held, unmixed with other grain, subject to the order of the consignees, without incurring great additional expense, and they would hardly claim the right, under their charters, to erect elevators of their own, for the purpose of adding the business of commission merchants to that of common carriers. If they were to do so, the tendency of such a practice to create a dangerous monopoly, would probably soon arrest the attention of the legislature, and lead to its prohibition. The custom of delivering grain at the elevators to which it is consigned, and which are connected with the line by convenient side tracks, has thus grown into one of the necessities of railway commerce."

This court in *Gibson v. Stevens*, 8 Howard 399, has said "In examining the question between these parties, it is proper to say, that, if the fact had not been admitted that the dealing between McQueen and McKay and the plaintiff was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it. * * * The statement of facts in this case describes the usual course of the great inland commerce by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing; and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood: and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean."

The rule includes notice of the great lines of public travel

and transportation, and their connections with each other, and the general course of trade and transportation throughout the country.

Smith v. N. Y. C. R. R. Co., 43 Barb. 225.

The court will take judicial notice of the ordinary mode of transacting business.

Bronson v. Wiman, 4 Seld. 182.

See also,

Duncan v. Little, 2 Bibb. 426.
Bell's Heirs v. Barnet, 2 J. J. Marsh 520.
Boulimet v. State, 28 Ala. 88.
The Mersey Prize case, Blatchf. 187.
Waring v. Mayor, 8 Wal. 115.

In the statement of the case I have presented such facts in regard to the course of trade and the usages of business so far as I understand them to be material. These facts are as much a part of the record as those mentioned in the stipulation, or the statute, for a violation of which these parties were prosecuted.

I.

The third, fourth, fifth and fifteenth Sections of the Illinois Statute, under which the plaintiffs in error were convicted and fined, are repugnant to the third clause of Section eight of Article one of the constitution of the United States.

The plaintiffs in error claim that the part of the Statute enacted by the legislature of Illinois, April 25, 1871, which prohibited them from continuing their business of handling and storing grain in their warehouse, unless they took out a license from the Circuit court of Cook county, and gave bond to conform to the provisions of Section fifteen, fixing the compensation

they might receive, to be repugnant to the provision of the Federal constitution, which confers upon Congress the power to regulate commerce with foreign nations and among the several States.

It is not material to consider the other portions of the Statute, because they are not dependent on those asserted to be void, and the record shows that the plaintiffs in error have complied with all of them. Nor is it important to consider Article XIII of the constitution of Illinois, entitled "warehouses," because all of its provisions have been observed, and these parties were not prosecuted for any violation of the constitution.

When this cause was pending in the courts of Illinois, it was proper to consider the provisions of the State constitution in determining the validity of the statute; but whatever may be the correct conclusion in regard to it, that is not now a question before this court. The Supreme court of Illinois did not sustain the Statute because of the provision in the constitution of Illinois, in regard to warehouses, but placed their decision upon the ground that the legislature was not restrained by the constitution of the State, or of the United States, from making such a law.

It is admitted that the judgment of that court excludes the discussion of every question, except that which involves the conflict of the statute with the Federal constitution.

Whether other parts of this legislation are of binding force, or not, these parties did not care to raise any question touching them. They will be found to embrace the grading and inspection of grain, the issue and cancellation of warehouse receipts, the reports of grain in store, and other matters, all of which are within the police power of the State, and were intended to guard against fraud and crime.

I invite the attention of your Honors to the question now presented, which involves an examination of the power of Congress to regulate commerce, and the limitation on the power of the State to make rules affecting the transportation of articles of trade.

1. *This court has jurisdiction under section 25 of the judiciary act.*

This case comes properly before this court under the twenty-fifth section of the judiciary act.

Ward v. Maryland, 12 Wal. 423.

2. *The business of the plaintiffs in error is covered by the word "commerce."*

In the *case of the State Freight Tax*, 15 Wallace 275 (*Reading Railroad Company v. Pennsylvania*), it is said: "Beyond all question the transportation of freight, or of the subjects of commerce for the purpose of exchange or sale, is a constitutent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another, was the prominent idea in the minds of the framers of the constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. * * * Nor does it make any difference whether this interchange of commodities is by

land or by water. In either case the bringing of the goods from the seller to the buyer is commerce."

It is not necessary to examine the numerous cases in which the word commerce has been defined, for with the expression of this court in the case just cited there can be no doubt that the transportation of the articles of commerce from one State to another is embraced within the meaning of the constitutional provision.

If the carriage of grain in boats and vessels by land and water is commerce, then the handling of grain in the manner shown by this record is commerce. The *only* mode by which the immense quantity of the wheat, corn, oats and barley produced in the western and northwestern States can be transported and sold to consumers is by the use of elevators, such as that owned by the plaintiffs in error. By their use the contents of a car can be transferred in a few minutes to another car or vessel; a train of cars can be emptied in an hour into the warehouse, where it can remain in store at the pleasure of the owner, and loaded from the warehouse into the vessel, or another train of cars, in as brief a period of time. It would be *physically impossible* to handle such quantities of these products in any other way. The warehouse or elevator is just as necessary for the purposes of commerce and trade, as the bottoms which float on the water, or the superstructure on which the cars run, or the use of locomotives and cars. Without such houses and machinery the railroads of the West would cease to pay expenses, the shipping upon the lakes would be seriously crippled, and trade would languish.

It is, therefore, insisted that the *business* of the grain elevators or warehouses in Chicago is a part of the commerce of the country, within the meaning of the word as used in the constitution.

3. *The business is a part of the inter-State and foreign commerce of the country.*

It is true that these houses are located wholly within the State of Illinois, and that they receive and store grain which is both produced and consumed in the State, and to that extent the business relates to the internal commerce of the State, and is beyond the control of Congress. But, it is equally true that much the largest part of the grain received, stored, and transferred, comes from another State, and is sent to still another State, or to a foreign country. The business, therefore, embraces both inter-State and foreign commerce. The same point was considered in the *Case of the State Freight Tax*, where a tax of so much per ton was imposed upon the freight carried by the Reading Railroad Company, which operated a line wholly within the State of Pennsylvania. It is said in the opinion: "Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-State trade. We are not, at this moment, inquiring further than whether taxing goods carried, because they are carried, is a regulation of carriage. The State may tax its internal commerce, but if an act to tax inter-State and foreign commerce is unconstitutional, is is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation, because the same rule may be applied to carriage which is wholly internal. Doubtless, a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar

conditions for allowing transportation wholly within the State." 15 Wal. 276, 277.

In that case separate accounts were made out for freight carried within the State, and another for freight carried without the State, so that the act, so far as it purported to allow the tax on the latter class of freight, was held to be void.

In the case at bar there can be no such severance. The act of the legislature required, as a condition to do business as warehousemen, that they should take out a license and give a bond, which would bind them to receive no more than the prices fixed by the fifteenth section of the act. In the nature of the case there could be no severance of internal from other commerce. The provisions were dependent; they were to be taken as a whole; the licensee would be compelled to regulate his charges as to grain going out of the State the same as that to remain in it. More, it would be impossible for a warehouseman to know where the grain received and stored in his warehouse would go.

4. *The act of the Illinois legislature is a regulation of commerce.*

It has been a subject of discussion in nearly all of the cases where this provision of the constitution has been construed, as to whether the acts challenged amounted to a *regulation* of commerce.

The case at bar presents no such difficulty. It is a clear case of regulation. The statute did not fix a fee for the license, or require the payment of any tax, or any sum of money whatever. It has none of the elements of most of the cases, which sought to raise directly or indirectly, revenue. This statute required every warehouseman of class A to receive for storage any grain tendered in the usual and ordinary course of business,

without discrimination, to the extent of the capacity of the house; it required him to store it with grain of a similar grade, or in a separate bin as the consignee desired; it required him to issue such a receipt as the act prescribed; it required him to furnish statements to the public and to an officer of the State; it required him to fix, during the first week of every year, a schedule of rates to be charged for the year, and publish them in a newspaper; it prohibited the mixing of grades; it punished the fraudulent issue of receipts, or the delivery of grain without the surrender of the receipt.

In addition to these unequivocal acts of regulation, the statute in the 15th section regulated the prices which the warehousemen might lawfully charge, by fixing the maximum charges.

There is no provision in the law to enforce an observance of most of these regulations, including that of charges, except the license and the bond. The only object of the license and the bond was to compel a compliance with the other parts of the same, or future statutes. Beyond all controversy, therefore, this was a case of direct regulation of the business of the owners of elevators in Chicago, which was a part of the commerce of the country.

5. *The power asserted by the legislature of Illinois is one of restraint as well as of regulation.*

It is said in *Gibbons v. Ogden*, 9 Wheat., 232: "Licensing acts, in fact, in legislation, are universally restraining acts."

In *Brown v. Maryland*, 12 Wheat., 448, the court say: "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce,

since an essential part of that regulation, and the principal object of it is, to prescribe regular means for accomplishing that introduction and incorporation."

In that case an act of Maryland which required an importer to take a license and pay fifty dollars, before he should be permitted to sell a package of imported goods, was held to be unconstitutional, because it was a restraint upon and regulation of commerce.

This court said, in *Osborne v. Mobile*, 16 Wal., 481, that inter-State commerce was by the constitution designed to be *entirely free*, and the tax on tonnage in the *State Freight Tax Case*, 15 Wal., was held to be unconstitutional, because it was in effect, a restriction upon inter-State commerce.

In commenting on the case of *Almy v. California*, 24 How., 169, the court say, in *Woodruff v. Parham*, 8 Wal., 138, that the imposition of a tax on a bill of lading of gold and silver shipped from California to New York, was a regulation of commerce, in conflict with that freedom of transit of goods between one State to another, which is within the rule laid down in *Crandall v. Nevada*, 6 Wal., 35, and in conflict with the authority of Congress to regulate commerce among the States.

When the power is vested in Congress, and taken from the States, it is immaterial as to the effect the State legislation may have on the persons engaged in commerce, or upon the articles of trade. *It is a question of power alone.*

In *Brown v. Maryland*, 12 Wheat. 439, it is said: "It is obvious that the same power which imposes a light duty, can impose a heavy one, one which amounts to prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

In the case of the *State Freight Tax*, 15 Wal. 276, the court say: "And as there is no limit to the rate of taxation, she (the State) may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines."

6. *The State legislature has not concurrent power with Congress to enact the provisions in question.*

It has been held by this court that the State may act upon some subjects, which are a part of the commerce of the country, until Congress shall exercise its power, and that some matters are more properly within the control of the State legislature than of Congress. There has been much discussion of the question as to the exclusive possession of the power over commerce by Congress. But whatever difference of opinion there may be in regard to some cases, there does not seem to be any room for it in the case now before the court.

The legislature authorized the erection of a dam across Blackbird creek, for the purpose of drainage and to protect health, and this act was sustained, although the creek was an inlet from the Delaware river where tide water flowed and was navigable.

Wilson v. Blackbird Marsh Co., 2 Peters 250.

A bridge across the Schuylkill, where the tide ebbed and

flowed, so as to obstruct navigation to the complainant's wharf, was held within the power of the State.

Gilman v. Philadelphia, 3 Wal. 721.

The regulation of the sale of liquors is within the power of the States.

License Cases, 5 How. 504.

Bartemeyer v. Iowa, 18 Wal. 132.

Police, inspection and quarantine laws, may be passed by a State legislature.

New York v. Miln, 11 Peters 102.

Gibbons v. Ogden, 9 Wheat. 222.

Gilman v. Philadelphia, 3 Wal. 730.

It is said in *Gilman v. Philadelphia*, 3 Wal. 730, that "The States may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the Federal constitution. 2. Where it is given to the United States and prohibited to the States. 3. Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."

This court, in the case of the *State Freight Tax*, 15 Wal. 279, say: "And certainly it has never yet been decided by this court that the power to regulate inter-State, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams, wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in *Gilman v. Philadelphia*, it was said, 'can be best regulated by rules and provisions, suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively.' However, this

may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require *exclusive* legislation by Congress. Surely, transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property, passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of western States may thus be effectually excluded from eastern markets, for through it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government."

Again, it is said, page 281: "Inter-State transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon inter-State transportation of persons is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State in conflict with the Federal constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is, *pro tanto*, a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established, that no State can impose a tax upon freight

transported from State to State, or upon the transportation because of such transportation."

I do not propose to enter into a discussion of the police power of a State in this part of the argument, but will do so hereafter, and endeavor to demonstrate that the act of the legislature cannot be sustained as a proper exercise of that power. It is only the present purpose to show that the act conflicts with the power of Congress to regulate commerce.

Having called attention to the rules of law as established by this court, I proceed to make an application of them to the facts in this record.

7. *Application of the rules of law to the facts of this case.*

We may dismiss from our minds all parts of the act of the legislature of Illinois, except sections three, four, five and fifteen.

Indeed, our attention may be mainly confined to the fifteenth section. The first and second sections select the elevators located *within the city limits of Chicago* (that being the only city of 100,000 inhabitants), designate them as class A, and undertake to regulate the business of the owners of these particular warehouses. An elevator may stand on the South Branch of the Chicago river, *without* the city limits, and be free from the control of this law; the elevators of East St. Louis, Cairo, Galena and Fulton are not subject to its provisions. While this fact may not make the law obnoxious to the provision of the constitution in regard to the regulation of commerce, yet it is so remarkable in its character and illustrates the manner in which the different States may regulate commerce, if allowed to do so, that attention is called to it.

The fifteenth section fixes the maximum price which the manager of a grain warehouse located in Chicago may charge for handling and storing grain. The legislature assume the power to determine the price which may be received or paid for the use of the property, capital and labor of the owner of the warehouse. If there is power to fix a maximum price, there is power to fix a minimum price, or to prescribe an arbitrary sum, without any flexibility, whatever. If there is power to fix a low amount there is power to name a high one. There is no limit to such a power, save the discretion of the legislature.

The record in this case shows that the plaintiffs in error "had stored and mixed grain of different owners together in said 'Northwestern Elevator' only by and with the consent and permission of such owners, or the consignees of such grain, who consented, not only that such grain should be received, stored and mixed together by the respondents in manner aforesaid, but that it should be done for, and subject to the established and published rates of storage demanded by said respondents, and the other warehousemen in the city of Chicago." Record 5.

The legislature, by this act, declares that a mutual contract between the owner of grain and the warehouseman for handling and storing it to be void, and to constitute no defence to prosecution for a violation of the law. *The freedom of commerce is thus completely destroyed.* The act does not seize upon some fraud or immoral act and declare it to be a misdemeanor, and therefore, unlawful, but it undertakes to deprive parties of the right to make a contract in regard to the lawful commerce of the country. The only reason, which can be supposed to exist for the making of such a legislative rule, is that it is conceived to be a wise regulation of commerce, in order to prevent oppressive contracts. It is not important to consider the power of the

legislature to make a fraudulent conspiracy to control prices, or a combination to exact unreasonable prices, a misdemeanor which may be punished by fine, for this act is not of that character. It is a bald attempt to disable those engaged in the commerce of the country from making their own contracts, and to prevent prices from being regulated by the general commercial laws of the country.

If this power is sustained, the legislature may, by another act, declare that every such warehouseman may charge and receive five cents for every bushel of grain received. The citizen of Wisconsin who lives on the Northwestern railroad, and raises grain on his farm, or the merchant to whom he sells his products, where the prices are regulated by the London or New York markets, or perhaps those of Chicago, cannot obtain the full value of his property, because the five cents levy for the warehouseman of Chicago must be deducted. He cannot escape this gateway to commerce; there is no other route by which the grain can reach its ultimate market, for the lines of transportation all lie through this city of Chicago.

The legislature of Illinois is to-day in the control of the producing classes, but another time it may be within the management of the warehousemen and carriers. Once admit this power and there will be no protection of the people from each other.

If the legislature of Illinois can thus make commercial rules, the legislature of New York can do so too. A statute may be passed in regard to the grain elevators at Buffalo, and the farmers and dealers of the West will be subject to such rules as New York pleases to enact, as well as of Illinois. Every other State may exercise the same power, and it is to be supposed that retaliatory legislation would be the sure result. The object of

the Union of these States which was to remove just such a state of affairs in the confederation, would be defeated.

The effect of this principle may be further considered. Suppose that the legislature of New York should pass a law regulating the warehousemen in the city of New York, by fixing the prices which they might receive for storing the imports from foreign countries, How long would commerce exist? What would be the effect on the interior States?

The plaintiffs in error were engaged in the business of receiving and storing grain coming from Illinois, Wisconsin, Iowa, Minnesota, Kansas, Nebraska and other States. While it might be within the power of the legislature of Illinois to pass an act requiring them to take a license and give a bond before continuing their business of receiving and storing grain carried entirely in Illinois, yet this act prohibited them from continuing their business of every kind until they took the license and gave the bond. Perhaps the legislature might fix the prices for Illinois products consumed in that State, yet this act is general, covering the entire business of a city, four-fifths of which is derived from other States. There is no possible way of separating the constitutional from the unconstitutional.

The plaintiffs in error were fined for doing business as warehousemen, on the 28th day of June, 1872, without taking out a license and giving a bond. What business did they do on that day? Whose grain did they receive or store? Was it the production and property of the citizens of Wisconsin, or of Illinois? It devolved on the prosecution to prove that the accused were guilty of an unlawful act. If the act might be lawful, there could be no conviction. The record in this case shows that these parties may have done no act contrary to the

constitution of the United States, or any law consistent therewith.

The provisions of the disputed sections do not come within any of the cases where State legislation has been sustained. No comparison can be made with the erection of a bridge under municipal authority, nor to quarantine laws, nor to police regulations, relating to the good order of society. The principle involved, if adopted, is national in its application. If a tax on freight, transported on a railroad, is such a regulation of commerce as invades the power of Congress, much more is the assertion of a power that imposes a restraint on the freedom of commercial contracts, and fixes the compensation for the use of property and the prices of labor. If a license, for which $50 was to be paid before the merchant could sell the goods imported, was an unconstitutional restraint, much more is a license for which no tax is demanded, and a bond which binds the warehousemen to accept an arbitrary price fixed by the legislature, an unconstitutional restraint. If a tax of one dollar on each passenger leaving a particular State is such an interference with the power of Congress to regulate commerce as to make the law imposing it void, much more is a statute which would compel a man to pay the price to the manager of an elevator for storing and transferring his grain, at the place of transhipment in another State, on its way to market.

This case has none of the elements of a revenue measure such as the case of *Osborne v. Mobile*, 16 Wal. 480.

There is not a single case ever decided by this court, which approved State legislation upon a subject of commerce, which justifies such legislation as that of the General Assembly of Illinois.

The plaintiffs in error submit that the exercise of the power of regulation, as was done in this case, of a necessary part of the business of inter-State, and foreign commerce is directly hostile to the exercise of the power confided to the Federal government; and that there can be no concurrent exercise of the power in this manner. This is a subject on which the power of Congress must, in the nature of things, be exclusive.

I have not deemed it necessary to call attention to the acts of Congress, establishing Chicago as a port of entry, and in regard to the navigation of the lakes, and the improvements of harbors, and other acts, showing that Congress has assumed to act in regard to commerce, which would embrace this subject, because it seems that the act in question is a clear invasion of the general power of Congress.

II.

The sections of the act of the legislature of Illinois, alleged to be void, are repugnant to a part of the fifth clause of section nine of article one of the constitution.

It is ordained in the 5th clause of § 9, Article I, that, "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

It will scarcely be denied that Congress would be prevented by this provision of the constitution from passing a law in regard to the warehouses in the city of Chicago, which should regulate and fix the prices to be received and paid. If the prices were fixed at lower rates than capital could afford at ports in other States, it would, in effect, be a preference over the ports in another State. If the rates were fixed at higher rates, it would be a preference in favor of the ports in another State. If Congress had power to fix prices at all, it must be by general and

uniform law. If Congress is so restrained by the constitution, then commercial regulations of that character could not be made by the legislature of a State, because that would be doing indirectly that which could not be done directly. The spirit of this constutional provision is that all commercial regulations and rules enacted into law shall be uniform, as to places and persons.

The statute of Illinois conflicts with this principle, for it gives the preference to warehousemen at all points in the State outside of the city of Chicago.

It must be admitted that this act attempts to regulate commerce, and if there be concurrent power in the State with the Federal government, or the State may exercise the power, in the absence of any law of Congress upon the subject, then it seems to be clear that the legislature of the State must be governed by the same rule of the constitution as Congress.

III.

Sections three, four, five and fifteen of the act of the legislature of Illinois, approved April 25, 1871, are repugnant to a part of Section one, Article XIV, of the Amendments to the Constitution.

The Fourteenth Amendment ordains that "No State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These provisions have been discussed to some extent in the *Slaughter House Cases*, 16 Wal. 57, and *Bartmeyer v. Iowa*, 18 Wal. 132.

In the latter case Mr. Justice Miller in delivering the opinion of the court said, "But if it were true, and it was fairly pre-

sented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: *First*, whether this would be a statute depriving him of his proporty without due process of law; and *secondly*, whether if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court? Both of these questions, whenever they may be presented us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position."

These questions are now presented by the record in the case at bar, in the due course of business, and we ask for them the consideration which their importance deserves. There is nothing fictitious about this case. The facts were admitted on which the judgment of the Criminal court of Cook county was based, because there was no disputing them, but as there was serious doubt as to the validity of the law, the case was carried to the Supreme court of Illinois as a test case. It will be apparent that there was never any purpose originally to bring the case to this court. It was believed that the law would be held unconstitutional by the State court, but being disappointed in that expectation the cause is now before your Honors.

The questions presented are of vital importance to those engaged in the grain trade in and through Chicago, and to other dependent interests. As the statute in question is the first one in the history of this country, or of England for more than two centuries, where the power to fix the compensation a private person might receive for the use of his private property, and for his

capital invested in a private pursuit, and his labor and skill in managing it, it will be conceded that search ought to be made for the source of such a power. When the principle involved gives to the legislature the power to fix the price of a day's labor, the cost of a coat, the value of flour, sugar, and every article of trade and consumption the propriety of a doubt as to the correctness of the principle will be admitted. It is so contrary to all received ideas on the subject, that those who assert the power may well be challenged to produce the proof of its existence, and the *onus* of the argument thrown on them.

But as I represent the plaintiffs in this court I will endeavor to demonstrate the negative, and to show that such legislation is prohibited by the fourteenth amendment.

1. *The construction of the provision which protects life, liberty and property.*

It is admitted that prior to the adoption of the fourteenth amendment, there was no provision in the constitution of the United States which prevented a State from depriving any person of life, liberty, or property without due process of law; but as substantially the same language was in the constitution of England originating with *Magna Charta*, and as the same language was used in the fifth amendment as a restriction upon the government of the United States, and as similar language was used in every State constitution, it is to be supposed that it was incorporated into the fourteenth amendment as a restriction upon the States, with the construction then given by the courts.

While it is known that the protection of the colored race, recently emancipated from slavery was the immediate object of this amendment, yet there are no words of limitation, and it operates as a prohibition upon all States, and in regard to all

persons. A special occasion suggested the necessity of the provision, but constitutional provisions and laws cannot be confined to the case, or class of cases, which gave rise to them. Such a rule would prevent the application of the principles of an organic law to new developments created by progress in science, art and commerce. Such a view would make invalid a law enacted in one of the late slave States, which would be sustained in the former free States; it would declare a law void where applied to men of color, who had been slaves, and maintain it when applied to white men and free-born colored people. There is no warrant for such a construction.

What is due process of law? *Mr. Webster*, in his argument of the Dartmouth College case, says, "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legslative judgments, decress, and forfeitures of all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under." 5 *Webster's Works*, 487

Lord Coke, in commenting on the 29th chapter of Magna

Charta, says, "No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), by the due course and process of law." *Coke*, 2 Inst. 46.

This court say in *Murrays' Lessee v. Hoboken Land and Imp. Co.*, 18 Howard 276, "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke in his commentary on these words, says "they mean due process of law. * * * To have followed, as in the State constitutions and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person should be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in fact superfluous and inappropriate. To have taken the clause 'law of the land,' without its immediate context, might possibly give rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning."

"Due process of law" implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding.

2 *Coke's Inst.*, 47, 50.
Hoke v. Henderson, 4 Dev. N. C., 15.
Taylor v. Porter 4 Hill 146.
Wynchemer v. People, 13 N. *Y.* 393.
Cooley's Const. Lim. 351 *et seq.*

The provision in *Magna Charta* was forced from John by the Barons as a restraint upon the power of the crown. The constitutions of this country have made this provision a part of the

fundamental law as a barrier against the power of the government over the life, liberty and property of the citizen. While governments are instituted to make such rules as may be necessasy for the general welfare of society and administer justice among men, the power is not absolute. But the hand of the government is stayed by the law which binds it as well as the subject, from interfering with life, liberty, or property of the private individual, except by a trial and judgment according to some general law.

Every person is entitled to personal liberty, which includes the right to follow such pursuit or occupation as he pleases, and to the control and use of his own property in the manner he desires. The government cannot take these rights from him, except in the administration of justice, according to the course of the common law. He is the judge of his own interests and welfare, and not the government.

2. *The use of private property is protected as well as the property itself.*

The proposition that private property cannot be taken from the owner by the government, will be admitted. but it will be claimed that the act of the legislature of Illinois does not deprive the owner of the property, but only regulates its use, and that this is not prohibited by the constitution.

It is true that the act does not attempt to divest the owner of the naked legal title, nor to oust him from the actual possession of the property, but it does declare that he shall not be entitled to receive a greater compensation for the use of the property, including his own personal services and the labor of his employees, than that fixed in the law. It is to be remembered this is a question of power alone. It is of no consequence whether the sum named is reasonable or unreasonable. The legis-

lature have fixed a price less than the price before, which was satisfactory to the warehousemen and their customers, and it is evident there is a difference of opinion as to what is a fair compensation. The question is, can the legislature decide the value of the use of property, and the price of labor and mercandise? If the legislature can fix two cents per bushel for thirty days' storage, it can fix ten cents, or one mill; and, in the latter case it will be admitted that it would be equivalent to a destruction of the property interest.

This clause says that, no person shall be deprived of life. Is the right to life limited to mere vitality, the right to exist, as contra-distinguished from death? Does not this restraint prevent the government from passing an act to put out the eyes or cut off the legs? This clause says, no person shall be deprived of his liberty. Is personal liberty to be confined to freedom from confinement in a prision? Does it not include the liberty to go and come at pleasure, to pursue one's own tastes, to choose his own occupation and select his own associates? Could the government pass an act, compelling a man to pursue a particular occupation, to dwell at a certain place, or associate with persons named?

When the constitution prohibited the government from depriving any person of his property, it was intended to preserve to the owner such use of the property as he chose. The legislature cannot direct a man to use his land, or his house, or his horses in a particular way, and compel him to receive the prices fixed in the law for the use of his property or for his personal skill or labor. Any other construction would leave a barren and worthless right, not worth the name. The only value of property is derived from its use. The beneficial title is far better

than the naked legal title. Take from the owner the right to use it and receive its profits, and all that is valuable is taken.

This court, in construing a similar provision in the constitution of Wisconsin, say: "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pumpelly v. Green Bay Co., 13 Wal., 177.

This principle is asserted in

Sinnickson v. Johnson, 2 Harr. N. J., 129.
Gardner v. Newburgh, 2 J. Ch., 162.
Cases in 13 Wal., 179.

The same principle has been applied to the construction of

that part of the constitution which prohibits any State from impairing the obligation of a contract.

Green v. Biddle, 8 Wheat. 1.
Bronson v. Kinzie, 1 How. 311.
Cooley on Const. Lim., 290.
Walker v. Whitehead, 16 Wal. 314.
Rawley v. Hooker, 21 Ind. 144.
Ogden v. Saunders, 12 Wheat. 259.
Willard v. Longstreet, 2 Doug. Mich. 172.
Gaulty's lessee v. Ewing, 3 How. 707.

3. *The Police power of the State.*

If this act of the legislature of Illinois can be sustained at all, it must be for the reason that it comes within the police power reserved to the States. I will endeavor to show that it does not.

Blackstone defines the public police as the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.

4 Black. Com. 162.

Jeremy Bentham says: "Police is, in general, a system of precaution, either for the prevention of crimes or calamities: 1. Police for the prevention of offences. 2. Police for the prevention of calamities. 3. Police for the prevention of endemic diseases. 4. Police for charity. 5. Police for interior communications. 6. Police of public amusements. 7. Police for recent intelligence. 8. Police for registration."

Edinburgh Ed. of Works, Part IX, 157.

Cooley says: "The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve public order and to prevent offences against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment by others."

Cooley's Const. Lim. 572.

Redfield says: "This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the State. According to the maxim, *sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

Thorpe v. Rutland & Bur. R. R. Co., 27 Vt. 149.

Chief Justice Shaw said: "We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."

Com. v. Alger, 7 Cush. 84.

Kent says: "But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of

others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

2 Kent Com., 340.

See, Broom's Legal Maxims, 357.

"Powers, the exercise of which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the constitution, can be such only as are clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion, that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would include it."

People v. I. & M. P. R. R. Co., 9 Mich. 307.

To the same effect is—

Cooley on Const. Lim. 577.

Lake View v. Rosehill Cem. Co., 6 Chicago Legal News, 120.

Benson v. Mayor, 10 Barb. 245.

Vanderbilt v. Adams, 7 Cow. 349.

These are some of the general definitions of police power,

and the cases in which it has been applied are such as passing quarantine laws to protect health, and prevent the spread of contagious diseases, fixing the places for deposit of powder, requiring fields of castor beans to be fenced, prohibiting the sale of intoxicating liquors as leading to pauperism and crime, prohibiting the sale of obscene books as affecting public morals, regulating the place of slaughtering animals, requiring railroads to fence their tracks and regulating speed, and numerous others of kindred character.

But every case is within the principle that property cannot be used so as to affect the public peace, or morals, or produce disease, or offend the senses, or produce pauperism or crime. There is no case which justifies the legislature in fixing the price of labor, or the value of property, in the ordinary trade and commerce of the country.

There is no pretence that the warehouses, for handling or storing grain, in Chicago, are a nuisance, or that the property is used to the injury of the peace or good order of society, or so as to jeopardize the public health, or that the business is conducted in an offensive manner. This act of the legislature does not rest upon any such assumption, but it is a bold assertion of power to control the use of property so as to take its benefits, partially or wholly, from the owner, and give it to a person not the owner. It is a naked attempt to take private property from the owner and give it to another person, when not necessary for the public use, and without compensation.

It is not an answer to say that the plaintiffs in error may use their property for any other purpose, and that therefore they are not deprived of their property, or that they are entitled to receive, under the law, some price for the use of the property.

This property is peculiar in construction, and the building is worthless for any other purpose, so that, if compelled by the restrictions of the statute to abandon the business, they are deprived of the value of the building, which is property. If, under the rates prescribed by the statute, the income is, say $10,000 less per year, then they are deprived of property, the value of which is sufficient to produce an income of that amount, and this is property. The precise sum taken from the warehouseman is transferred to the owner of the grain, and thus constitutes a legislative transfer of property from one man, against his will, to another.

This is not a regulation of the use of property for the future. The plaintiffs in error leased the ground and erected their elevator in 1862. They had, during the course of ten years, become skillful in their business and had established a large and profitable custom. This property interest belonged to them as private individuals. They were no more public warehousemen, than the merchant who sells his merchandise to the public is a public merchant, or a blacksmith who shoes horses for the public is a public blacksmith. It was a most singular idea that by calling a man who is a farmer, or tailor, or merchant, a public farmer, or public tailor, or public merchant, that thereby he is brought within legislative control. A common carrier has been said to hold a public office, but that for reasons peculiar to that business, and they do not apply to a man who builds a warehouse to store goods or grain for hire. The plaintiffs in error, relying upon their acknowledged right to manage their own property, and to use their own capital as they pleased, subject only to the laws of trade and competition, embarked in this business and pursued it for ten years, and acquired a valuable private property. It was at this point of time and under these

circumstances that the legislature, by this act, declared that a further continuance of the business, and a further use of their property was unlawful, unless they submitted to the prices fixed by the legislature, and assented to the right of that body to change and fix others. This was depriving them of their property, and also of liberty.

Winehamer v. People, 13 N. Y. 378.
Com. v. Alger, 7 Cushing 85.
Bartmeyer v. Iowa, 18 Wal. 132.

There is no authority or precedent which can be produced to sustain the exercise of such power by the legislature, but there are authorities to the contrary.

Judge Cooley says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before known to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or to a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars

of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

Cooley on Const. Lim. 393.

The Supreme court of Kentucky, in deciding a statute unconstitutional, which provided that all persons who failed to improve a class of lands in a certain manner, should forfeit them, said: "I am unwilling, however, to concede that the legislature can, under the pretext of promoting the interest of the State, control and direct the citizen in the use he shall make of his private property. I subscribe to the maxim, *sic utero tuo ut alienum non lædas*, and I admit the power to punish for an injury done to individuals or the public, but I deny that the legislature can constitutionally prescribe, under color of preventing public or private mischief, the quantity of labor the citizen shall perform on his farm, the kind of improvements he shall make, and the time within which they shall be constructed. The toleration of such power on the part of the government would be conceding to it the right of controlling every man, and directing what road he shall travel in the pursuit of happiness. Thus, the freedom of the citizen would be lost in the despotic will of the government, and under the semblance of liberty, we should have the essence of tyranny."

Doe ex dem. Gaines v. Buford, 1 Dana 490.

The Supreme court of Indiana in holding a statute unconstitutional, which required lawyers to defend criminals gratuitously, said: "The legal profession having been thus stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demanded of every other class. His

legal knowledge is his capital stock. His professional services are no more at the mercy of the public as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect, imposes a tax to that extent upon such class clearly in violation of the fundamental law which provides for a uniform and equal rate of assessment and taxation upon all citizens."

Webb v. Baird, 6 Ind. 17.

The opinion of the majority of the Supreme court of Illinois asserts in different ways that the warehousemen of Chicago are a set of combined monopolists; that the producers and dealers in grain had no option but to submit to their oppression, and that the legislature had power to relieve the sufferers from such tyranny.

The Attorney General of Illinois laid great stress upon this point, and relied on the statement of the agreed facts, that the rates of storage received by the plaintiffs in error were such as had been agreed upon and established by the different elevators in Chicago, and which had been annually published in January. The record does not justify any conclusion that these warehousemen had been engaged in a conspiracy, or entered into a combination to exact unreasonable prices. The statute required rates to be fixed and published in January every year to be charged during that year. This required action at that time. There is nothing to show that the different elevators agreed to charge the same prices, or that they made any agreement with each other. As the rates for the year were to be fixed beyond the power of change, it would follow that warehouses in competition and in similar situations would naturally fix upon the same rates. It is impossible to conclude from these premises that the prices

were unreasonable, or oppressive, or that any combination has been made to the injury of others. Such assumptions are not only not supported by the record, but they are not true. The prices of these warehouses are reasonable, and there has not been any complaint of them.

But suppose all this were true, did that justify the legislature in assuming the right to establish and fix prices ? Clearly not. The power to punish an unlawful and fraudulent combination or conspiracy is not denied. This may be and is done by appropriate legislation ; but because a man has been guilty of an act wrong and even unlawful, does not justify the legislature in assuming the control of his property and fixing the prices he could receive and breaking up the freedom of trade, and taking away the liberty of the citizen to obtain happiness in such occupation as he pleases. It is mockery to say, as was said by the Supreme court of Illinois, " Kindred subjects, such as public warehouses, public mills, the weight and price of bread, and public ferries, are so connected with the public welfare that a government, destitute of the power to regulate them, to impose such restrictions upon them, as may be deemed necessary to promote the greatest good of the greatest number, would be but the shadow of a government, whose blazonry might well be ' the cap and bells and a pointless spear ; ' " it was just such a government of England, established by the Normans, which John relinquished at Runnymede. The people, in the fundamental law of this country, have denied the right to the government to judge of the public welfare, where it involves an invasion of their liberty or private property. They have stipulated for the right to exercise their own judgment as to the public welfare, so far as their private property and personal liberty were involved.

The Supreme court of Illinois supposed there was an anal-

ogy or comparison between this act in regard to grain warehouses, called in the law public, and the usury laws, the laws fixing tolls for mills and ferries, the regulation of prices charged by draymen and hackmen, and ordinances fixing the weight of bread. These instances of the exercise of legislative power to fix prices were accepted as proof that prices could be fixed for handling and storing grain.

In Bacon's Abridgment, vol. 7, page 188, of the edition of 1807, under the head of "Usury at Common Law," is the following:

"Anciently it was holden to be absolutely unlawful for a "christian to take any kind of usury, and that whosoever was "guilty of it was liable to be punished by the censure of the "church in his life-time; and that if after death any one was "found to have been a usurer while living, all his chattels were "forfeited to the king, and his land escheated to the lord of the "fee."

"Also it seemeth to have been the opinion of the maker of "some acts of parliament, as 5 Ed. VI, c. 29, 13 Eliz., c. 8, § 5, "and 21 Jac. I, c. 17, § 5, that all kinds of usury are contrary "to a good conscience."

"And agreeably thereto it seemeth formerly to have been "the general opinion that no action could be maintained on any "promise to pay any kind of use for the forbearance of money, "because that all such contracts were thought to be unlawful, "and consequently void."

Subsequently this view of usury became modified, and a limited interest was allowed by law, under heavy penalties for exceeding the prescribed rate, starting with the statute of 12 C. II, and 12 Ann, which imposed a forfeiture of treble the value

of the money lent, and gradually reducing the penalty, until the recent statutes of Victoria have made it comparatively nominal.

Money which is, in the main, the subject of usury, if it can rightfully be regarded as property, still holds a peculiar relation to the government, distinguishing it from all other articles of private ownership. It is made and issued by the government alone, and therefore is primarily subject exclusively to governmental control. Its proper use and function is the establishment of a standard of value for all other commodities. It comes from the hands of the government, with a special mission assigned to it, and for the accomplishment of that mission, it is needful that it circulate freely from hand to hand, in the numerous exchanges of trade and commerce. In all these particulars it is essentially different from all other kind of property, and these differences naturally and necessarily bring it further within the reach and control of governmental authority. Even if the taking of interest for the use of money was entirely prohibited, its commercial value would still remain to it, and its legitimate office would be undisturbed; for it would still be the standard of values, and would fill the same place as now in the exchanges of the country. In this respect, also, it differs very materially from real estate, which can have a value only in proportion to the income or profits resulting from its use.

The legislative right to regulate the tolls of ferries and mills, had its origin in the prerogatives of royalty; and the privilege of keeping a ferry or a mill was a franchise dependent upon the will of the sovereign.

"The right to keep a ferry is, in England, an incorporeal "hereditament, being a franchise granted by the crown, or "depending upon prescription, which supposes a grant. The

"party entitled to the franchise, has imposed upon him by law, "certain duties, incurs certain liabilities, and has a remedy "against anyone, who, without right, interferes with his profits "or disturbs him in the enjoyment of his property."

Angell on Highways, Sec. 47.

Birset v. Hart, Willes 508.

"A ferry should be regularly established by law, for the "owner of a private ferry is not authorized to land passengers "on the opposite side of the stream without the consent of the "opposite riparian proprietor."

Angell on Highways, Sec. 48.

The case of *Mills et al. v. The County of St. Clair*, 2 Gilman, 197, and the case of *Dundy v. Chambers et al.*, 23 Ills. 369, both recognize the doctrine that the right to keep and maintain a ferry is a franchise, and that the privileges granted are, in their nature, exclusive. The right emanates from the sovereign power, and is, therefore, necessarily subject to such regulations and restrictions as the sovereign power may see fit to impose.

"To compel all the tenants within the king's manor to grind "at the king's mill, is a personal prerogative of the king's. "But it will extend to a fee-farmer, because it is for the king's "advantage."

"In an action on the case for erecting a mill, the lord de- "clared upon a custom *for all the inhabitants* to grind at his mill, "and that the defendant had built a mill there contrary to the "custom. Adjudged a good custom and well pleaded. And "suit to a mill may be, by reason of tenure of service, and also "by custom, and so may bind strangers."

15 Viner's Abridgement 398.

Hix v. Gardner, Bulstrod's Rep'ts (Hil. Term, 11 Jac.) 195.

These citations indicate clearly the origin of legislative control over the tolls of ferries and mills. The right of control is incident to the right to create the franchise; and in the making of the grant, it is entirely competent to affix to it such conditions as to the grantor shall seem proper. But there is no such origin or history in respect to the right to keep a warehouse. The right to build and operate a warehouse was at common law, and always has been a private and individual right. The business is in its nature a private business. There are not and never were, any exclusive privileges associated with it; nor did the law ever assume to protect it, by any *special* guaranties or penalties.

The constitutional power to establish uniform weights and measures, is as applicable to a loaf of bread as it is to a bushel of corn; but the power to fix the price of a loaf of bread (if there is any such power), was, it is believed, never exercised in this country, nor was it ever attempted to be exercised, except in despotic governments, and only then in times of famine or other peculiar emergencies of the State.

There still remains the instance of draymen and hackmen in populous towns and cities, whose avocation is on the public streets, and who, sometimes for purposes of taxation, and sometimes as matter purely of police regulation are compelled by law to take out licenses, and to submit to fixed rates of compensation; and the case of *Commonwealth v. Duane*, 98 Mass., has been cited in support of this power. There is no need of attempting to question the power, or dispute the authority of the case referred to. It is amply sufficient to say, that the regulation of draymen and hackmen, including the charges they shall be entitled to, has been recognized as within the legitimate exercise of the police power of the government ever since the

settlement of this country. It came to the colonies with the common law of England, and was a recognized power of government when the constitutions of the States and of the nation were adopted. So far as it is a regulation, or fixing of the compensation for the services, and the use of the property of the citizen, in a business or vocation free to all, it has hitherto stood, solitary and alone, an exception to the theory and practice of our government.

It is entirely unnecessary to attempt any explanation of the radical differences between a drayman or hackman, whose place and business is in the public highway, and whose stock in trade consists simply of his horse and vehicle of some sort, and a warehouseman in the city of Chicago, occupying his own private property, costing hundreds of thousands of dollars, for the purposes of a business strictly private in its nature. The court cannot fail to see that the cases are not parallel, and that the reasons which might be urged in favor of legislative control over the one, cannot, from the very nature of things, be applicable to the other. It is possibly true, and there is no necessity of argument to the contrary in this case, that the uniform practice of the government, coupled with the long continued acquiescence of parties interested, has matured these regulations, apparently in conflict with the private rights of the citizen, into fixed and permanent rules of municipal government, and that by common consent, and universal custom of the country, they have become engrafted upon our system as an exception to the principles upon which that system is founded. There is nothing new or startling in this view of the case. Such anomalies have their precedents under all forms of aggregated society, and, it would seem to be much more reasonable to recognize as an exception (if it is necessary to do so) a particular instance, to

which the people have become accustomed by uniform acquiescence, than to attempt to use that exception as a precedent for the overthrow of the fundamental principles by which private property and private rights in the aggregate have been hitherto protected.

4. *The sections of the act of the Illinois legislature are repugnant to the provision of the fourteenth amendment that, no State shall deny to any person, within its jurisdiction, the equal protection of the laws.*

Judge Cooley says: "Every one has a right to be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to be governed by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

Cooley on Const. Lim. 391.

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who

made the law by another; whereas the like general law affecting the whole community equally could not have been passed."

Wally's Heirs v. Kennedy, 2 Yerger 554.

These views accord with the common sentiment of justice in all men. It is true that laws, local in their application, are frequently enacted, or in regard to a particular class, as carriers or bankers, but the law now in question is not a local law within the proper meaning of the term and it does not embrace all warehousemen, as a particular class. The owners of certain kind of grain warehouses, in cities of over 100,000 inhabitants, are singled out as a class, and *arbitrarily* called class "A." The fact is, that Chicago is the only city in the State having over 100,000 inhabitants; the fact is that there are fourteen of the kind of warehouses described in the act; the fact is that these are owned by about thirty persons. The law is therefore, in effect, to regulate the warehouses of about thirty persons in a single city in the State.

The city of Chicago covers an area of about 25 square miles. The Chicago river is navigable and has docks and wharves outside of the city. The port of South Chicago, on the Calumet, adjoins the city. The State has about 60,000 square miles, and contains several other cities, some of them ports of entry by act of Congress. In a number of them there are grain elevators of exactly the same description as those in Chicago. No restrictions are placed upon any warehouses of this kind in the State without Chicago, touching the price, or requiring a license or bond. Why was this distinction made? Was it the case supposed in Yerger, that the law was made in favor of the law makers and the mass of the community against a small number of persons odious to the majority? Was it intended to close rival houses and divert the business to other

points? It is true the Supreme court of Illinois has decided this statute was not in conflict with the constitution of that State, because of its partial or special character; but the plaintiffs in error insist that it is repugnant to the last words of the first section of the fourteenth amendment to the constitution.

The owners of elevators in Chicago are entitled to be governed by laws which operate equally upon all in the State. If a warehouseman in Quincy is permitted to control his own property and exercise personal liberty in regard to his compensation, while the same kind of a warehouseman in Chicago cannot, then the latter is deprived of the equal protection of the laws. The principle is involved. If this legislation is valid, a statute could be passed in Mississippi fixing the prices that the laborers on plantations in a certain county should receive, and the negro be required to obtain a license and give a bond to obey the law, before he could be allowed to work on a plantation.

This wise provision of the constitution guarantees to the inhabitants of every State equal laws from its legislature, that is, they must be governed and operate equally upon all persons in the State in similar circumstances. The fact that one man resides in one county, or upon one quarter-section from another, is not such a difference of circumstances as to allow a different statute to govern him from that which controls others of the same class.

If a majority of one legislature can fix prices for the minority, so in turn that minority may obtain power at another legislature, and fix prices for the products or merchandise of their adversaries. When capital is in the control, the price of labor will be fixed; when labor holds the power, the investment of the capitalists must suffer. The price of corn may be made

high to-day and reduced to-morrow. All trade and commerce will be destroyed, and a struggle at the polls will be the substitute for the natural laws of supply and demand. How long would it be before the struggle would be with arms and anarchy reign?

5. *The provisions of the constitution of Illinois in regard to warehouses do not affect the questions.*

A provision of a State constitution is a law within the meaning of the Federal constitution as much as a statute of the legislature.

Railroad v. McClure, 10 Wal. 515.
Rouse v. Home of the Friendless, 8 *Ib.* 430.
Rouse v. Washington, *Ib.* 439.

The property rights of the plaintiffs in error were in existence in 1870, when the constitution of Illinois was adopted, as much as when the statute was enacted in 1871. Even if the legislature obeyed the mandate of the constitution in passing the act, that will not affect the plaintiffs in error, if it is repugnant to the Federal constitution.

The thirteenth article of the Illinois constitution does not direct the legislature to make the rules now disputed. These parties have complied with every part of the constitution, and with that part of the statute which was passed in pursuance of the constitution.

W. C. GOUDY,
For Plaintiffs in Error.

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Error to Supreme Court of Illinois.

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vs.

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May it please the Court:

The brief and argument of my learned associate relieves me of the necessity of making more than a short and formal reference to the facts contained in the record of this cause.

Statement.

In the year 1862, the plaintiffs in error erected, upon ground in the city of Chicago, leased by them for that purpose, a grain elevator and warehouse, ever since known as the "Northwestern Elevator," and from the time of its completion up to the time of the institution of these proceedings, transacted, in said warehouse, the business of receiving and storing grain for hire. Prior to the year 1871, the General Assembly of the State of Illinois had enacted various laws, having relation to the manner of conducting that business, all being of a general character and applicable throughout the State; and the scope of which was the prevention of frauds in the weighing and grading of grain, and in the issuing of warehouse receipts, and the establishment of such police regulations for the business, as were regarded as necessary and proper, and amongst others was a provision requiring warehousemen to publish a schedule of their rates of storage for the ensuing year, during the first week in January in each year.

Under the stimulus of the requirements of this law, warehousemen in Chicago had for several years consulted together, to a greater or less extent, in respect to their charges for storing and handling grain, and the prices had been for many years

substantially uniform at two (2) cents per bushel for the *first twenty* (20) *days*, or any part thereof, and one-half a cent per bushel for each succeeding *ten* (10) *days*, or any part thereof, these prices including, in addition to storage, all expenses of receiving and delivering the grain.

In the year 1871, the General Assembly of Illinois passed an act, which was approved on the 25th day of April, in that year, entitled "An Act to regulate Public Warehouses, and the "Warehousing and Inspection of Grain, and to give effect to "Article XIII of the Constitution of this State." The only provisions of the act material to be considered here, are the 1st, 2d, 3d, 4th, 5th and 15th sections, the substance of which is as follows:

Section 1 divides public warehouses, as defined in Article XIII of the Constitution of the State, into three classes, designated as classes A, B, and C.

Section 2 provides that class A shall embrace all warehouses, elevators or granaries, in which grain is stored in bulk, and in which the grain of different owners is mixed together, located in cities having not less than 100,000 inhabitants.

Section 3 provides that the proprietor, lessee or manager of a warehouse of class A shall be required, before transacting any business as such warehouseman, *to procure a license* from the Circuit Court of the county in which it is situated, *permitting him to transact business as a public warehouseman* — such license to give authority to carry on such business "*in accordance with* "*the laws of this State*," and to be revocable by the court granting it, upon a summary proceeding, for any violation of such laws.

Section 4 requires that the person receiving a license, shall file with the clerk of the court granting it, a bond to the people of the State of Illinois in the penal sum of ten thousand dollars, with security to be approved by the court, "conditioned for the "faithful performance of his duty as a public warehouseman of "class A, *and his full and unreserved compliance with all laws* "of this State in *relation thereto*."

Section 5 provides that any person, transacting business as a public warehouseman of class A, without first procuring a li-

cense, or who shall continue such business after his license has been revoked, shall, on conviction, be fined not less than $100, nor more than $500 for each day he so carries on business, " and " the court may refuse to renew any license, or grant a new " one, to any person whose license is revoked, within one year " from the time the same was revoked."

Section 15 is, in fact, a reproduction of a previous law, requiring warehousemen of class A, during the first week in January in each year, to publish, in one or more newspapers of the city in which their warehouses are situated, a schedule of storage rates for the ensuing year, and then provides that " The maximum charge for the storage and handling of grain, in- " cluding the cost of receiving and delivering, shall be, *for the* " *first thirty days*, or part thereof, *two cents per bushel*, and for " each fifteen days, or part thereof, after the first thirty days, one- " half of one cent per bushel."

This legislation was, by its own terms, limited in its application, to warehouses in the city of Chicago, that being the only city in the State having the specified population, and to a comparatively small number of warehouses of which the " Northwestern Elevator " of the plaintiffs in error was one.

The act took effect on July 1st, 1871, after the plaintiffs in error had been in the possession and enjoyment of this warehouse property, as private property, for nine years. The rates of storage had been fixed and published for that year as required by law, and no change was made on account of the passage of the act.

The same rate was fixed and published for the year 1872, (printed Record, p. 5,) the plaintiffs in error, though conforming to the other requirement of the act, refusing to recognize the right of the General Assembly to fix prices upon their services and the use of their private property, and therefore refusing to take out a license as warehousemen, or to give a bond, under the 4th section of the act. The rates of storage, as fixed and published by them for the year 1872, were the same as for previous years, viz: two cents per bushel for the first *twenty* days, or any part thereof, and one-half cent for each succeeding *ten* days, or any part thereof, after the first *twenty* days,

instead of the same rates for *thirty* and *fifteen* days respectively, which were named as the *maximum* by the 15th section of the act.

For transacting business as public warehousemen of class A, without taking out a license and giving a bond in pursuance of the requirement of the act of April 25th, 1871, the State's Attorney of Cook county, exhibited and filed in the Criminal Court of said county an information against the plaintiffs in error. The plea of not guilty being interposed, the cause was submitted to the court upon an agreed statement of facts, upon which the plaintiffs in error were found guilty, and adjudged to pay a fine of one hundred dollars. From that judgment a writ of error was prosecuted to the Supreme Court of Illinois, where the judgment was affirmed by a divided court; and the cause is now brought into this court, under provisions of law in such cases, for re-examination and review, upon the ground that the act of the General Assembly of Illinois, approved April 25th, 1871, so far as it is involved in this case, is repugnant to the Constitution of the United States, and therefore void.

The agreed statement upon which the cause was heard, sets forth more in detail the facts above given, and also the further fact, that after the Act of April 25, 1871, took effect, the plaintiffs in error received and stored grain only by special agreement with the owners thereof, who in all cases assented to the rates of storage charged by them.

The opinion of the majority of the Supreme Court of Illinois, and also the dissenting opinion, are set forth in the record, and it is apparent upon inspection, as well as from the certificate of the Chief Justice of that court, that the validity of the Act of April, 25, 1871, under the Constitution of the United States, was brought in question, and that the decision of the Illinois Courts was in favor of its validity.

It is now claimed that the provision of that act, and especially the 15th Section, fixing or attempting to fix, maximum rates of charges for storing and handling grain, are repugnant to the 3d Clause of the 8th Section of Article 1, of the Federal Constitution, and also to the 5th Article and the 1st Section of the 14th Article of the Amendments to said constitution.

My learned brother and associate has so fully stated and considered that part of the case which falls under the 3d clause of the 8th Section of Article 1, that I shall not trouble the court with any effort to enlarge upon his argument, and in this discussion shall endeavor to confine myself to this single proposition, viz :

The provisions of the Illinois Warehouse Act, which are here brought in question, are repugnant to the principles upon which our government was founded, as declared in Article 5 of the Amendment to the Federal Constitution, and are also within the prohibitions of the 1st Section of Article 14 of said amendments which says : "Nor shall any State deprive any person of life, "liberty or property, without due process of law, nor deny to any ".person, within its jurisdiction, the equal protection of the law."

Argument.

It is not to be disguised, that in the earlier periods of civil government, attempts of various kinds were made by those in authority, to control and abridge in different ways and for different purposes, the rights and privileges of the citizen as now understood. Civilization and government did not spring at one bound from the barbarous and chaotic condition assigned to mankind originally by all writers upon municipal law, into the comparatively perfected form which they have assumed in this latter half of the nineteenth century. There were periods, or eras of transition, times when old forms and old theories were in progress of displacement; when new elements, incapable of philosophical combination with the old ones, were struggling for the ascendency; and even when these new elements, having, in the main, acquired the mastery, were yet unable to wholly ignore and put aside the theories and practices which they had in great measure superseded. Many of the notions of, and pertaining to, the parental form of government, intruded themselves into the patriarchal, and when, in progress of time, the latter gave place to theocracies, and they in turn to the more matured and better regulated forms of kingly domination, there still remained in each succeeding regime, and too firmly rooted to admit of immediate abolishment, many features, habits, customs and theories of the previous system, which manifestly influenced the relations of the government to the governed, in proportions constantly diminishing, as they receded from the point of formal and apparent change. It is by no means correct, therefore, to say, that everything which may be found involved and mixed up, in any particular form or system of civil government in the course of its history, naturally or necessarily belongs to and is a part of that form or system. The elimination of the old is always gradual, and frequently slow in its progress. The habits of communities, like

those of individuals, are changed only by persistent and continued efforts. Opinions are modified more easily than the methods of enforcing them. New ideas, as a general rule, first seek expression through old formulas, for the reason that the ideas must be perfected before new formulas can be devised for communicating them to others. In the same way, the new system or theory of civil government, must prove the insufficiency and want of adaptation, of old rules and practices to the proper accomplishment of its ends, before it will venture to strike out for itself upon untried and merely experimental regulations or methods of developing itself. Protestantism sought at first to maintain itself, as well as to widen and deepen its influence, by the same or similar systems of persecutions to which it had been subjected by the church from which it had seceded. The American colonists, driven from the old countries by what they deemed harsh and unjust, and, in some cases, unconstitutional regulations of a political or religious character, still, in their new settlement, looking to the protection of themselves only, adopted, in many instances, regulations equally harsh, oppressive, and unconstitutional, for the government of their several communities. Would it be either fair or correct to say, that these regulations belonged to and were a part of the new order of things, which they designed to establish? Was it not rather an attempt of the new principles and theories to work themselves out through old instrumentalities, and the only ones to which the people were accustomed, and the unfitness and incongruity of which would naturally be discovered only by experiment and trial? That the latter was the fact is plainly demonstrated by the result; for gradually new rules and regulations, in harmony with the spirit of the new theory and the new system, were adopted, and, in proportion as this harmony became complete, the rules and instrumentalities of the old system were abolished, or fell into disuse. This was invariably the result in all cases, where the new system and theory had a stronger hold upon the minds of the people, than the old forms and regulations which they had been accustomed to regard as the proper methods of expressing the popular mind, and when the substance of government was considered of more importance than the means

of enforcing it. If, in any case, the attachment to the old form was stronger than the attachment to the new principle, the two being incompatible, the old system gradually supplanted the new until harmony was again restored. In this contest between principle and theory on the one side, and the means and methods of their enforcement on the other, many rules and regulations were adopted, which were, in terms, never repealed or set aside. They stand as monuments of the severity of the contest through which the people passed in their struggle between attachment to new ideas, and veneration for old forms and regulations. They have not been broken down ; but they are now as harmless, and as evidently without force or influence, as though they were covered in every line and letter with the formal stamp of public repudiation. Of this character are many of what are called the "Blue Laws" of Connecticut, which are said never to have been formally repealed, but which no repealing act could ever place more effectually than they now are, amongst the dead and buried relics of the past. Their observance is not expected, and could not be enforced, and probably no court could be found to recognize their validity, and simply because they are repugnant to the new ideas and system of government, of which they can never be a consistent part, and of which they were never more than experimental instruments, abandoned speedily as disastrous failures. New rules and new methods with which they are as much at variance as they are with the new ideas and the new system in which these new rules and new methods had their origin, have filled their places, and the experiment of which they formed a part, can no more be set up against the new and perfected rules and methods adapted to the new ideas and systems, than can the abandoned experiment of a novice in inventions, be set up to defeat the patent for a perfected mechanism.

At the time of the formation of the governments of the original States, and the adoption of their several constitutions, the new ideas of civil government, upon which the Colonies had been mainly planted, had well nigh achieved a complete victory over the attachments to old rules and regulations, which had been imported by them from the old world; much more was this the

case in relation to the people of the new States, that came in under the provisions of the Constitution of the United States, and framed their constitutions of government, in the main, in harmony with the new ideas, then better developed and more fully understood. The theory and principles of our form of government, call it by what name you will, had then received complete and suitable expression in the Declaration of Independence, the Constitution of the United States, and in the Constitutions of the States then organized, and the spirit and purposes of it, were, in general terms, well and clearly defined; and it is not too much to say, that that government is not more definitely distinguished from those which preceded it, in the simplicity of its administration, than it is in respect to the right guaranteed by it to the private and individual citizen. Both Federal and State constitutions, speaking generally, placed private rights beyond the reach of any arbitrary exercise of governmental power, and if, in the broad foundation of popular sovereignty, on which it rests, there is any pillar or corner stone which gives support and character to the superstructure in any greater degree than any other, it is that by virtue of which, the rights of the individual, whether he be of the majority, or of the minority of the community, are made certain and protected equally with the rights of all his fellow members of the civil society.

It would be prolixity without profit to cite the several constitutions of the States in support of these propositions. The bills of rights, which they all contain, are, substantially, of the same character, and directed mainly to the security and protection of private rights, and, without these features, the Constitution of the United States was deemed defective, as not being fully in harmony with the advanced ideas of government, which it was intended thereby to establish and perpetuate. Hence the several amendments from time to time made thereto, in which stand conspicuous the provisions guaranteeing private and individual rights, and prohibiting their abridgment by either Federal or State legislation.

Not forgetting the questions upon which this court must finally determine the correctness or incorrectness of the judgment of the Supreme Court of Illinois in this case, it is insisted that

the provisions of the several State Constitutions above referred to, are germain to this discussion, as showing the scope and purposes of the government under which that judgment was rendered, and the ideas and principles upon which that government was founded; for the instrumentalities or machinery through which that government operates and manifests itself, must be in harmony with those ideas and principles, and, in their effects, within the scope and purposes of the government, else the old antagonism is revived, and the one or the other will be compelled to give way. These various provisions of the State Constitutions, all of which have been framed as they now stand, since the adoption of the Federal Constitution, are also, in themselves so many supports to that construction of the latter instrument, which will be here contended for.

To show that there has been no departure from the general principles underlying the government of other States, in the State of Illinois, it is proper to refer to some of the provisions of the several constitutions from time to time adopted by the people of that State.

Article 8 of the Constitution of 1818 has in it these several provisions, amongst others:

First. "That all men are born equally free and independent, "*and have certain inerent and indefeasible rights, amongst* "*which* are those of enjoying and defending life and liberty, and "of *acquiring, possessing, and protecting* property and reputation, "and of pursuing their own happiness."

"*Second.* That the people shall be secure in their persons, "houses, papers and posessions from unreasonable search and "siezure, etc."

"*Third.* No person shall, for the same offence, be twice put "in jeopardy of his life or limb; *nor shall any man's property be* "*taken or applied to public use*, without the consent of his repre- "sentatives in the General Assembly, *nor without just compen-* "*sation being made to him.*"

These same provisions were literally transferred into the Illinois Constitution of 1848, and the following, amongst others, was added: "That no freeman shall be imprisoned or divested of "his freehold, liberties or privileges, or outlawed or exiled, or

" *in any manner* deprived of his life, liberty or property, but by " the judgment of his peers or the law of the land."

The Constitution of 1870 has the following bold and comprehensive declaration of the purposes of government, viz: " All " men are by nature free and independent, and have certain in- " herent and inalienable rights, amongst them are life, liberty " and the pursuit of happiness. *To secure* these rights *and the* " *protection of property*, governments are instituted amongst " men, deriving their just powers from the consent of the gov- " erned."

Immediately following it is this language: " No man shall be " deprived of life, liberty or property, without due process of " law." And again, Sec. 13 of Art. 2: " Private property shall " not be taken or damaged for public use, without just compen- " sation. Such compensation, when not made by the State, *shall* " *be ascertained by a jury as shall be prescribed by law.*"

The several constitutions of the State of Illinois, under which the people of the State have acquired their property rights, therefore, have at all times recognized those rights, and guaranteed their inviolability, by absolutely taking away from the Legislature the power of arbitrarily abridging their exercise. It is a noticeable fact, also, that these provisions of the State Constitutions, are, in some cases, literally, in others, substantially, copied from the first amendments to the Federal Constitution, so that, in this respect, there is, and ever has been, perfect harmony between these several instruments; and when it is considered that similar provisions are contained in all other State constitutions, it can but forcibly appear, that, in the scheme of government devised and adopted for this nation, the protection of private, individual rights had a conspicuous place, and was intended to be a permanent feature. Protection to private rights is *the law of the land* in the broadest sense of that phraseology. It is woven into every constitution, and made permanent and secure by penalties and prohibitions, so much so, that the government itself rests upon it as an axiom and fundamental principle. It is the peculiar and distinguishing feature of this government, without which, a President instead of an Emperor, elections by the people instead of succession by divine appointment, would be but formal differ-

ances, yielding no practical advantages. The provision of the Federal Constitution, embodying these principles, is as follows: "No person shall be held to answer for a capital, or otherwise "infamous crime, unless on a presentment or indictment of a "grand jury, except, etc., nor shall any person be subject for "the same offence to be twice put in jeopardy of life or limb; "nor shall be compelled in any criminal case to be witness "against himself, *nor be deprived of life, liberty or property* "*without* due process of law; nor shall private property be "taken for public use without just compensation." These, it is true, have been held to be limitations upon the federal power only; but that, here, is a matter of no consequence. They are, when thus applied, strong cumulative evidence of the proposition here insisted upon, that protection to private rights is the predominant idea and theory upon which this government of ours was established; so much so, that any legislation which violates or infringes these rights, may fairly be said to be in hostility to the fundamental principles upon which that government rests.

But the Fourteenth Amendment of the Federal Constitution has extended these principles to State legislation, and provides that, "No State shall make or enforce any law which shall "abridge the privileges or immunities of citizens of the United "States; *nor shall* any *State deprive any person of life, liberty or* "*property without due process of law*, nor deny to any person "within its jurisdiction the equal protection of the laws." And this still more strongly illustrates the continuing sense of the importance of protecting private rights against governmental interference, either State or Federal, for this amendment not only passed the Congress of the United States, at a comparatively recent date, but was also ratified and adopted by the legislatures of two-thirds of all the States, and thereby became a part of the supreme law of the land, which no State enactment can violate, and live.

In the legislation, which must be reviewed in the discussion of this cause, the court is brought face to face with one of the first efforts of the legislative department of a State to return to the old and discarded formulas of government, strongly in con-

trast with the ideas and principles upon which our government was formed, as defined and expressed in the several written constitutions above referred to. It is an attempt to work out protection to private right and private property through legislative control, not unlike the early efforts to work out and protect liberty of conscience through the instrumentality of religious persecution. If the things are compatible, if the means are adapted to the accomplishment of the results which the constitutions, State and Federal, undertake to guarantee, then both may stand. If not harmonious, then either the constitutions or the law must go to the wall.

This question arises here in this wise: The taking of a license and giving of a bond, as required by the 3d and 4th Sections of the act, would be in effect an adoption of, and acquiescence in, the provisions of the act, by the plaintiffs in error, and a waiver of their right to object to those provisions.

Cooley on Constitutional Limitations, 181.

The 15th Section of the Warehouse Act is, therefore, intimately interwoven with the provisions of the 3d and 4th Sections, which require the taking of a license and the giving of a bond; and in the progress of this litigation, it has not been claimed, and probably will not be, that there is any obligation, resting upon the plaintiffs in error, to take a license and give a bond, if the provisions of the 15th Section, fixing maximum rates of storage, are invalid. The proposition, therefore, is fairly presented for the determination of the court, whether, under the provisions of the Federal Constitution, and especially the 5th and 14th Amendments, it is competent for the General Assembly of the State of Illinois to interfere with, embarrass and possibly destroy the private property of the citizen, by fixing arbitrarily the value of it, or the value of its use, in connection with the services of the owner.

This is purely a question of power, and that too of arbitrary and irresponsible power. If it exists, and its mandates have the force of law, then it is a power to practically annihilate private property by destroying the value of its use—for if the legislature can fix the prices of the storage of grain in the warehouses of the plaintiffs in error, at two cents per bushel for 30 days, it

can fix it at one cent for the same time, or at half a cent for six months, and perhaps abolish it altogether. There is no limit to the power if it exists at all. The question of the reasonableness of the price, is not one involved in this record, nor does the warehouse act allow it to be made. The source to which the advocates of such arbitrary interference, on the part of the State, generally look for support and justification, is that undefined, irresponsible and mysterious element, usually called the police power.

COOLEY says, p. 577, that "the maxim, *sic utere tuo ut alienum* "*non laedas*, is that which lies at the foundation of this power." By this maxim, then, all that class of legislation must be tested in determining its legitimacy. With this in view, it may be material to inquire what there is in the business of a warehouseman, occupying his own property, requiring the interference of the State, in order that he may not do injury thereby to his neighbors or the public. It may be conceded that the State can make all such regulations as to the conduct of this or any other business, as are necessary for this purpose, and in all those particulars in which the act in question tends to this result, it may have a legitimate basis to rest upon. It is not easy, however, to perceive how a license and a bond, and the fixing of maximum rates of storage, can come within the rule. The legislature might just as well require a man to take out a license and give a bond before he should be permitted to live in his own dwelling house. If the property or business was of a character to become a nuisance, or dangerous to the health or morals of the community, it would be consistent with precedent, and the proper exercise of the police power, to hold it in check by bonds and licenses, and even to abate it altogether. But there is nothing of the kind pretended, nor is there anything in the nature of the property or of the business from which results of this character can be anticipated ; neither have any of the provisions of the act here involved, and least of all, the one fixing *maximum rates*, any direct reference to the manner of using the property or transacting the business, in the sense of the maxim, which lies at the foundation of the police power. The fixing of prices upon property or its use, has no more

tendency to prevent abuses in the warehousing business, carried on by means of it, or to prevent the warehousing business from becoming a nuisance, within the corrective exercise of the police power, than fixing a price upon lard, tallow, or grease, would have to correct the nuisance of a rendering establishment. There is no possible connection between the means employed and the results aimed at. The result, viz., the prevention of a public nuisance or injury, is unquestionably within the province of the police power, but the means adopted are not, for the reason that they have no tendency to produce the result—the means and the result are not in harmony, and hence, are not parts of the same system, and do not properly arrange themselves under the same head of governmental purposes. A fixing of prices might have a tendency to prevent extortion, or a conspiracy to extort, but extortions and conspiracies are crimes or misdemeanors at common law, and also under the statutes of the State, the commission of which may be punished by fine or imprisonment; but it was never yet heard that the results of a man's personal wrong-doing should be visited directly upon his property. His property may be taken under judicial process to satisfy penalties, which he may have incurred, but when was it ever known under our form of government, that a man's property might be stripped of its practical value, because, in the use of it, the owner might be guilty of a misdemeanor? As well might the law say that if a man commits larceny, and stores the stolen property in his warehouse, he shall not thereafter lease that house for storage purposes for more than 50 per cent. of his previous rental, and in order to prevent him from receiving and storing stolen property, the storage he shall be entitled to charge, shall be and is fixed at a nominal price. The incongruity is equally great, whether the enactment be put in the form of a prevention or a punishment for an offense. At the proper place, I shall endeavor to show that, in this instanse, the legislature has not undertaken to create any new offence, or define any old one, which is to be remedied by the act in question, under any recognized power of government.

In *Wilkinson* v. *Leland*, 2 Peters, 657, Mr. Justice STORY, in

discussing the power of the State government to make laws, uses this language: "What is the true extent of the power thus "granted, must be open to explanation *as well by usage*, as by "construction of the terms in which it is given. In a govern- "ment, professing to regard the *just rights of personal liberty* "*and property*, and which is required to legislate in subordina- "tion to the general laws of England, it would not lightly be "presumed, that the general principles of *magna charta* would "be disregarded, or that the estates of the subject were liable to "be taken away without trial, without notice, and without "offense. Even if such authority could be deemed to have been "confided by the charter to the general assembly of Rhode "Island, as an exercise of transcendental sovereignty before the "revolution, it can scarcely be imagined that that great event "could have left the people of that State *subject to its uncon-* "*trolled and arbitrary exercise. That government can scarcely* "*be deemed to be free, where the rights of property are left solely* "*dependent upon the will of a legislative body without any re-* "*straint. The fundamental maxims of a free government seem* "*to require* that the rights of personal liberty *and private* "*property should be held sacred.* At least, no court of justice, "in this country, would be warranted in assuming that the "power to violate and disregard them—*a power so repugnant* "*to the common principles of justice and civil liberty*—lurked "under any general grant of legislative authority, or ought to "be implied from any general expressions of the will of the "people."

The same learned jurist in delivering the opinion of this court in the case of *Terret* v. *Taylor*, 9 Cranch., at page 52, speaking of the power of the State legislature over vested private rights, says: "But that the legislature can repeal statutes creating "private corporations, or *confirming to them property already* "*acquired* under the faith of previous laws, and, by such repeal, "*can* vest the property of such corporations exclusively in the "State, *or dispose of the same to such purposes as they may please*, "without the consent or default of the corporators, we are not "prepared to admit. And we think ourselves standing upon "the principles of natural justice, upon the fundamental laws of

" every government, upon the spirit and letter of the Constitution " of the United States, and upon the decisions of most respectable " judicial tribunals, in resisting such a doctrine."

In the case of *Goshen* v. *Stonington*, 4 Conn., 225, HOSMER, Ch. J., delivering the opinion of the court, says: " With those " judges who assert the omnipotence of the legislature in all " cases where the constitution has not interposed an explicit " restraint, *I cannot agree.* Should there exist, what I know " as not only an incredible supposition, but a most remote im- " probability, a case of direct infraction of vested rights, too pal- " pable to be questioned and too unjust to be vindicated, I could " not avoid considering it as a violation of the social compact, " and within the control of the judiciary. If, for example, a law " was made, without any cause, to deprive a person of his pro- " perty, or to subject him to imprisonment, who would not ques- " tion its validity, and who would aid in carrying it into effect."

And what is the difference between depriving a man of his property, and depriving him of the profitable use of it? There is nothing that touches property so vitally, as an interference with its income, and the results of its use—crush out these, and its value is destroyed, and, as property, it is practically annihilated; and no act of government can be more significant of irresponsible despotism, than that which aims at such results. As before stated, it is immaterial to this case, whether the prices fixed by the 15th Section of the Warehouse Act are high or low, remunerative or ruinous—we are dealing with the question of the power to fix at all. The power to fix at one price, implies a power to fix at any other price; for the act does not permit the reasonableness or unreasonableness of the price to be inquired into at all.

The police power, whatever it may be, is conceded to be one of the powers inherent in every organized sovereign State, and exists by virtue of the sovereignty of the State. It is an undefined power. No constitution, so far as I am aware, has undertaken, in terms, to explain or limit it. Being thus undefined, efforts have sometimes been made to magnify it into an unlimited authority over the conduct and property of the citizen, thereby, in effect, if the proposition was correct, erecting a des-

potism within, but above, what we term free constitutions. In other words, it is argued, that this inherent power of sovereignty not being named in the limitations of our constitutions, is practically a free power, and, under it, the majority may work its pleasure. Hence it is, that such theorists always endeavor to refer any arbitrary act of the government to this undefined and, as they say, unrestricted source of power. In the opinion of the majority of the court below, a vigorous attempt is made to found the power to pass the warehouse law, upon an assumed authority or right in the legislature to impose such restrictions upon certain employments, including that of warehousemen, "as may be deemed necessary to furnish the great-" est good to the greatest number." This would seem to place the Supreme Court of Illinois in the front ranks of those who claim the widest scope for the exercise of the police power, as inhering in the sovereignty of the State. It might be interesting to point out the difference between the maxim announced by that court as the foundation upon which the police power rests, and the maxim to which it is referred by Judge COOLEY; but the difference is so apparent, that it cannot fail to suggest itself, and the labor of pointing it out is therefore unnecessary. The doctrine announced by the Illinois Court, in the few words above quoted from the majority opinion, cannot escape this criticism—that it opens wide the door to legislative encroachment upon private rights and private property. Under its operation, the citizen would have no rights which the legislative power would be bound to respect. His private possessions would be at the mercy of the legislative power, which would be the sole judge of what constituted "the greatest good "to the greatest number," and how far it would be necessary to strip the individual of his private rights in order to accomplish that greatest good. It strikes at the very foundation of that protection to private rights which, it is every where assumed, our constitutions are intended to give. The fact is, that the court misapplied a familiar principle, and, by that misapplication, has made the principle subversive of the very spirit and letter of the Federal and State constitutions. The principle is well enough, when confined to legislation of a general character, applicable to

all persons within the jurisdiction of the sovereignty; but it never was intended, at least, not under our constitutions, to apply to special, or class legislation, or legislation affecting particular interests or employments.

The police power, like every other, must exist and be exercised in subordination to the principles upon which governments are founded. If the government is despotic, and in the control of an autocrat, there is no limit to its arbitrary character, and no relief from its mandates, short of physicial resistance and revolution. Where the sovereign power is unlimited, the police power, as a part of its sovereignty, is unlimited also. A limited sovereignty cannot, from the very nature of the case, possess unlimited power; there cannot be, lurking within a limited power, a power capable of overriding all limitations. It is absurd, therefore, to say that a legislature, hedged about by constitutional limitations and restrictions upon its powers to legislate, can have, inherent in itself, under any name, a power to effectually override all their limitations and restrictions. The police power of the State exists, and must be exercised in Illinois, subject to those constitutional provisions, State and national, which prohibit the taking of private property for public use, without just compensation, and from depriving any person of life, liberty, or property, without due process of law. These constitutional provisions, being fundamental in our form of government, must have a liberal construction for the accomplishment of the purposes intended by them, and it is important to the correct determination of this case, that the scope of these constitutional prohibitions should be settled, and, to understand what the idea of government conveyed by the language employed, actually is. To such an inquiry, certain propositions, by way of answer, may be assumed to be self-evident, viz: that the government is prohibited, under all ordinary conditions, from arbitrarily wresting from the citizen, what we are accustomed to term his private property; that, as between the citizen and the government, the title of the citizen to his private estate shall be respected, and is superior to that of the government, unless it be required for public uses; that, if private property is required for public uses, it shall only be taken upon the pay-

ment of just compensation, and that the rights of the citizen shall not be divested, except in due course of judicial proceedings, in which he shall have the right to be heard before he is condemned, and an opportunity to make such defense as the nature and circumstances of his case admit of, consistent with established usages, and the general forms of conducting judicial investigations.

These are general propositions, about which there will probably be no dispute. But, is the force of the constitutional language exhausted by these general propositions, taken in their literal sense? Is there nothing guaranteed by them in respect to private property except security to its title and possession? Are the uses of private property, its value and income, without the pale of constitutional protection? And, does the constitution mean to throw safeguards and guaranties, around a naked title and a naked possession merely, and to leave all the uses of property and everything that makes property valuable, subject to legislative authority? No man can reasonably deny that the essence of private property consists of its uses, and the results that flow from its uses, as much so as the essence of life and liberty consists of the enjoyments which they are capable of supplying. One of the constitutional clauses which we are considering, provides that "No person shall be deprived of "*life* * * * without due process of law." This does not, in terms, prohibit the government from ordering various maiming operations to be performed upon the body of the citizen, by which he might be deprived of his limbs or organs—or their usefulness greatly impaired—operations going to the very essence of life. If the right to these organs, in their natural condition, stood upon no other foundation than the clause of the constitution above mentioned, would the court say that a legislative enactment directing these maiming operations to be performed upon a single citizen or class of citizens, was valid and must be enforced? Personal liberty is protected by the same constitutional safeguard, and in the same language. What does it mean? Is it a mere freedom from dungeons and fetters, and may the edict go forth from legislative power, that a citizen or class of citizens must confine themselves within a particular

district, and limit their enterprises to a particular profession or field of industry, and imposing fines, penalties and forfeitures, for wandering beyond the prescribed boundaries? And would the court say of such an act, that the citizen still had his limbs or his eyes, and could use them, and that that was liberty, as intended by the constitution? Was it not rather the essence than the form of life and liberty which the constitution was intended to preserve? There is no need to answer the question.

But there is no larger or different protection to life and liberty under the constitution than there is to private property. They are indissolubly joined together, and the guaranties in respect to one, are the guaranties in respect to all. When the constitution grants security and protection to the life of the citizen, it grants that security and protection to it, in such measure and fullness, as it was given to him by the Creator, and does not mean the mere element of life. It means protection to the man with all his natural capacities, and in all his vigor, and with all his members, and not the mere dismantled hulk of humanity, without organs or energies or capabilities by which to make that life useful to himself or the State.

Apply this rule to private property, and what is the result? Evidently that it is not merely the title and possession of property that the constitution designed to protect, but along with this, the control of the uses and income, the right of valuation and disposition, without which property ceases to be profitable, or even desirable. Deprive property of these elements, and what is there left of it to excite either enterprise or ambition? What is A's title to a house worth, if B has the power of fixing upon it a value, or a value for its use; and especially if B's authority extends to fixing a value at which he himself may take, or have the use of, the property? Which of the two men would have the larger and more valuable estate in the property?

The State of Illinois, by the legislation known as the Warehouse Law, has endeavored to create for itself this superior estate in the private property of the plaintiffs in error, and other warehousemen in Chicago, and is it reasonable to say, that if the effort succeeds, private property is not taken, or that the warehousemen are not deprived of their property "without due

"process of law?" The late Judge CURTIS, whose professional opinions will rank, in this country, next in authority to the judgments of our highest courts, in commenting upon the recent Railroad legislation in the State of Wisconsin, uses this very decided and emphatic language: "And my opinion is, that it "is not within the field of legislation, under any American con- "stitution, to fix and prescribe for the future what prices shall "be demanded either for commodities or for personal services, "or *for a union of both.* I do not believe it is within the power "of any legislature in the United States, to compel owners of "property, or persons, natural or political, to part with their "property, or render their personal services, at their own ex- "pense and risk, to the public, for prices fixed by the legisla- "ture." And further on, commenting upon that article of the Bill of Rights in the Constitution of Wisconsin, which forbids the taking of private property for public uses, he says: "*It is settled also upon the highest authority, that to amount to a* "TAKING *within the meaning of this Article of the Constitu-* "*tion, it is not necessary that the owner of the property* should "be deprived of its possession. If he is allowed to remain in "possession, but is forced, under heavy penalties, *so to use his* "*property as effectually to destroy or greatly impair its value,* "the case comes within this article of the Bill of Rights."

The opinion of this court in the case of *Pumpelly* v. *Green Bay Company*, 13 Wallace, 166, is also here much in point. There the same provision of the Constitution of Wisconsin came up for interpretation, and the court says: "The argument of "the defendant is, that there is no *taking* of the land within the "meaning of the constitutional provision, and that the damage "is a consequential result of such use of a navigable stream, as "the government had a right to, for the improvement of its "navigation.

"It would be a very curious and unsatisfactory result, if in con- "struing a provision of constitutional law, *always understood to* "*have been adopted for protection and security to the rights of the* "*individual against the government*, and which has received the "commendation of jurists, statesmen and commentators, as "placing the just principles of the common law, on that sub-

"ject, *beyond the power of ordinary legislation*, it shall be held, "that if the government refrains from the absolute conversion "of real property to the uses of the public, it can destroy its "value entirely; can inflict irreparable and permanent injury to "any extent; can, in effect, subject it to total destruction, with- "out making any compensation, *because, in the narrowest sense "of that word, it is not taken* for the public use. Such a con- "struction would pervert the constitutional provisions into a "restriction upon the rights of the private citizen, as those "rights stood at the common law, instead of the government; "and make it an authority for invasion of private rights, *under "the pretext of the public good*, which had no warrant in the "laws or practices of our ancestors."

Several years ago, the Legislature of New York passed an act declaring a portion of Racket River a public highway, for the purpose of floating logs and lumber. The riparian proprietors resisted this act, on the ground of private ownership, and the question came before the Court of Appeals, where it was held, that "If prior to the passage of the act, the stream was "private in its use as in property, the legislature could not "take away the right of those who were the riparian owners, "*nor subject such rights to a public use, created or author- "ized by the act itself, without compensation.*"

Morgan v. *King*, 35 N. Y., 454.

Compare these reasonable and authoritative expositions of the clause of the constitution in question, with that contained in the opinion of the majority of the Supreme Court of Illinois given in this case, and the reason of the judgment becomes somewhat apparent. They say: "All regulations of trade, with a view to "public interest, may more or less impair the value of property, "but they do not come within the constitutional inhibition, *un- "less they virtually take away and destroy those rights in which "property consists. Their destruction must be, for all substantial "purposes, total.*" This hard construction of a constitutional provision, intended for the security and protection of private property, has, it is believed, never before found judicial expression, and it is confidently submitted, that it is as repugnant to

authority and sound interpretation, as it is to common reason and the dictates of sound public policy.

Something may be fairly inferred as to the proper meaning of the word "property," as used in the clauses of the Constitutions, Federal and State, above referred to, from the course of judicial decisions upon another and an analogous provision. The Federal Constitution prohibits the States from passing any law impairing the obligation of contracts. This provision has been frequently before this and other courts, and the scope and effect of it may be regarded as definitely settled by a series of adjudications, too numerous and concurrent to be disregarded or disturbed; and by those decisions, it is settled, that it is not necessary, in order to bring the State Legislature within this prohibition of the constitution, that it should directly attack the contract; and that there are incidents to, and rights growing out of, the contract, which are so essential to it, and so much a part of it, that they are included in the constitutional protection as well as the letter of the contract itself.

In *Green* v. *Biddle*, 8 Wheaton, 1, this court says, (p. 75): "Nothing, in short, can be more clear, upon principles of law "and reason, than that a law which denies to the owner of "land a remedy to recover the possession of it, when withheld "by any person, however innocently he may have obtained it; "or to recover the profits received from it by the occupant, or "which clogs his recovery of such possession and profits, by "*conditions and restrictions tending to diminish the value and* "*amount of the thing recovered, impairs his right to and interest* "*in the property*. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If "the remedy be qualified and restrained, *by conditions of any* "*kind*, the right of the owner may indeed subsist, but it is impaired and made insecure according to the nature and extent "of such restrictions.

In the case of *Bronson* v. *Kinzie*, 1 Howard, 311, the question presented was, whether an act of the Legislature of Illinois, giving to the mortgagor twelve months within which to redeem from a sale of the mortgaged premises, under a decree of foreclosure, and prohibiting a sale for less than two-thirds of the

appraised value of the property, was, in its application to mortgages executed prior to the passage of the act, void as impairing the obligations of contracts. In deciding against the validity of the law as thus applied, the court quotes largely from the case of *Green* v. *Biddle*, and then (p. 318) says: "We have "quoted the entire paragraph, because it shows in a few plain "words, and illustrates by a familiar example, the connection "of the remedy with the right. It is the part of the municipal "law, which protects the right and the obligation by which it "maintains and enforces it. It is this protection which the "clause in the constitution now in question, was mainly intended "to secure; and it would be unjust to the memory of the dis-"tinguished men who framed it, *to suppose that it was designed* "*to protect a mere barren and abstract right without any practi-*"*cal operation upon the business of life.* It was undoubtedly "adopted as a part of the constitution, for a just and useful pur-"pose. *It was to maintain the integrity of contracts and secure* "*their faithful execution throughout the Union*, by placing them "under the protection of the Constitution of the United States; "and it would ill become this court, *under any circumstances*, to "depart from the plain meaning of the words used, and to sanc-"tion a distinction between the right and the remedy which "would render this provision illusive and nugatory, *mere words* "*of form*, affording no protection, and producing no practical "result."

A very slight change in the above language and the whole idea and doctrine of the quotation are applicable to the case at bar, and stand out in striking contrast with the prominent and apparently controlling idea of the Supreme Court of Illinois, that so long as legislation left the title and possession of property untouched, there was no taking in the constitutional sense, and that property consists in the thing itself, and not at all in the uses and income of it, or in the right to its revenues unimpaired. Such a construction of the constitution would surely make language, confessedly intended as a security and protection to private rights in private property, the guardian only of a mere "*barren and abstract right without any practical* "*operation upon the business of life*," and reduce it to "*mere*

" *words of form, affording no protection and producing no prac-*
" *tical results.*"

For further illustrations of the doctrine of the two cases above cited, reference is made to

Ogden v. *Saunders*, 12 Wheaton, 259.
Rawley v. *Hooker*, 21 Ind., 144.
Willard v. *Longstreet*, 2 Doug., (Mich.,) 172.
Goutty's Lessees v. *Ewing*, 3 Howard, 707.
Cooley's Con. Lim., 290.
Walker v. *Whitehead*, 16 Wallace, 314.

It would seem, then, to be apparent, both upon principle and authority, that the clause of the constitution, whether State or Federal, which forbids the taking of private property for public uses, without just compensation, is not only a protection to the title and possession of the owner of such property as against the public, but also to the substantial uses and income of it, and that there is the same want of legislative power to interfere with or control the one as the other. The prohibition extends to the essential interests and qualities of private property, and does not stop with its mere form and outward semblance. The phraseology, " private property," in the constitutional, as in the ordinary sense, means not only an individual title to and possession of the thing, but the right to its uses and income and revenues, such as naturally flow from the legitimate employment of it; and the legislature is as much prohibited from imposing upon it any public easement, or impressing upon it any public servitude, as it is from actually appropriating it, its title and possession, to public uses, without first making just compensation.

II.

For wise purposes, the powers of government are, in this country, distributed between three departments, the executive, legislative and judicial; and whilst it may be conceded that, in some respects, it is difficult to clearly define the boundaries between legislative and judicial powers, yet the very fact of the distribution is, of itself, conclusive, that each department has its

separate functions and field of action. There must be subjects purely judicial, as well as subjects purely legislative and executive; else these departments of government are mere duplications; and it is not necessary that the constitutional limitations upon these departments respectively, should be specific. Limitations result necessarily from the fact of the distribution of powers, and a legislative act may be as clearly unconstitutional for trenching upon the judicial authority of the State, as implied from the division of powers, as though it were in direct opposition to a plain constitutional prohibition.

"The frame of the government, the grant of legislative power "itself, the organization of the executive authority, the erection "of the principal courts of justice, create implied limitations "upon the law making authority, as strong as though a nega- "tive were expressed in each instance."

People v. *Draper*, 15 N. Y., 543.

"The rights of every individual must stand or fall by the "same rule or law that governs every other member of the "body politic, under similar circumstances; and every partial or "private law, which directly proposes to destroy or *affect individ-* "*ual rights* or *does the same thing by affording remedies tending* "*to* similar consequences, is unconstitutional and void; were it "otherwise, odious individuals and corporations would be gov- "erned by one law; the mass of the community and those who "made the laws by another, whereas the like general law af- "fecting the whole community equally, could not have been "passed."

Walley's Heirs v. *Kennedy*, 2 Yerg., 554.

"Every one has a right to demand that he be governed by "general rules, and a special statute, which without his consent "singles his case out as one to be regulated by a different law "from that which is applied in all similar cases, *would not be le-* "*gitimate legislation, but would be such an arbitrary mandate as* "*is not within the province of free government.*"

Cooley's Con. Lim., 391.

"*That is not legislation which adjudicates in a particular case,* "prescribes the rule contrary to the general law, and orders it

" to be enforced; *such power assimilates itself more closely to des-*
" *potic rule, than to any other attribute of government.*"

Ervine's Appeal, 16 Penn., 266.

" The legislative department assuming and being allowed to
" judge of the character and extent of its own powers, *would*
" *soon become the exparte arbiter of private rights*, and the fre-
" quent dispenser of justice between citizen and citizen, unre-
" strained and according to its own notions of right. The people
" have wisely by constitutional provisions guarded against such
" consequences, *and so long* as these *provisions are sacredly re-*
" *garded and enforced, their rights of person and property will re-*
" *main secure from aggression, under color of authority. The*
" legislative power *extends only to the making of laws, and in its*
" *exercise is limited and restrained by the paramount authority*
" of the Federal and State constitutions. *It cannot directly reach*
" *the property or vested rights* of the citizens, by providing for
" their forfeiture or transfer to another *without a trial or judg-*
" *ment of the courts*, for to do so would be the exercise of a pow-
" er which belongs to another branch of the government, and is
" forbidden to the Legislature."

Newland v. *Marsh*, 19 Ills., 382.

These judicial expressions of the limitations of legislative power, are founded partly upon implied and partly upon express prohibitions of the constitution, in subordination to which, legislation by the states must here be had; and the plain import of them is, that private property, as such, is not a proper subject of direct legislative attack; that the judicial department stands between the legislative authority and private property; and that it is only by or through its judgment and decrees that the private rights of the citizen can be reached. " Nor shall any " State deprive any person of life, liberty or property, without " due process of law." It will not be doubted that the word " property," as thus employed in the Federal Constitution, means " *private property;* " and if I have succeeded in establishing the proposition that these words, used in the constitutional sense, embrace not only the title and possession of the thing, but also the right to its uses, income and revenues, then the prohibition of the constitution is against State interference

with that right, as well as with the title and possession, "*without due process of law.*" Nor need there be any doubt or hesitation as to the proper signification of the phraseology, "*due process of law.*" This has been settled by adjudications in this and other courts, in such an authoritative way that nothing is left to be established in respect to it.

Webster, in his argument in the Dartmouth College case, gives a definition of these words, which has been much approved for its concise comprehensiveness. He says: "By "the law of the land, is most clearly intended the general law. "A law which hears before it condemns; which proceeds "upon inquiry, and renders judgment only after trial. The "meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules "which govern society. Everything, which may pass under "the form of an enactment, is not, therefore, to be considered "the law of the land. If this were so, acts of attainder, bills of "pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to "another, legislative judgments, decrees and forfeitures, in all "possible forms, would be the law of the land."

"Such a strange construction would render constitutional "provisions of the highest importance, completely inoperative "and void. It would tend directly to establish the union of all "powers in the legislature. *There would be no general permanent law for courts to administer or men to live under.* The "administration of justice, would be a farce—an idle ceremony. "Judges would sit to execute legislative judgments and decrees, "not to declare the law or *administer* the justice of the country. "'Is that the law of the land,' said Mr. BURKE, 'upon which if a "man go to Westminister Hall, and ask counsel by what tenure "or title, he holds his privilege or estate, *according to the law of "the land*, he should be told that the law of the land is not yet "known; that no decision or decree has yet been made in his "case; that when a decree shall be passed he will then learn "what the law of the land is? Will this be said to be the law "of the land by any lawyer who has a rag of a gown left upon "his back, or a wig with one tie upon his head?'"

A law, says BLACKSTONE, (1 Com., 44), "is a rule; not a "transient, sudden order from a superior to an inferior, to or "concerning a particular person; but something *permanent*, "*uniform and universal.* Therefore a particular act of the "legislature to confiscate the goods of Titus, or to attaint him of "high treason, does not enter into the idea of a municipal law, "for the operation of that act is spent upon Titus only, and has "no relation to the community in general. It is rather a sen- "tence than a law."

The Illinois Warehouse Law says to warehousemen in Chicago, and nowhere else, "use your warehouses in receiving and "storing grain, for all who may offer it without discrimination, "and you shall be allowed to charge for your services and the use "of your property, two (2) cents per bushel for the first thirty "(30) days, and one-half cent per bushel for the next fifteen "days—and no more." Is such a thing a law, which is a "rule, permanent, uniform and universal." Is it not rather a sentence, which exhausts itself against warehousemen in Chicago alone?

In *Hake* v. *Henderson*, 4 Dev., 15, the court says: "Those "terms, 'Law of the Land,' do not mean merely an act of the "general assembly. If they did, every restriction upon the legisla- "tive authority, would be at once abrogated. For what more can "the citizen suffer than to be taken, imprisoned, disseized of "his freehold, liberties and privileges, be outlawed, exiled and "destroyed, and be deprived of his property, his liberty and "his life, without crime? Yet all this he may suffer, if an act "of the assembly, simply denouncing these penalties upon "*particular persons or a particular class of persons*, be, in itself, "*a law of the land*, within the sense of the constitution; for "what is, in that sense, the law of the land, must be duly "observed by all, and upheld and enforced by the courts. In "reference to the infliction of punishment, *and divesting the* "*rights of property*, it has been repeatedly held in this State, "and it is believed in every other in the Union, that there are "limitations upon the legislative power, notwithstanding these "words. And that the clause itself means, that such legisla- "tive acts, as profess in themselves, directly to punish persons,

" *or to deprive the citizen of his property*, without trial before the " judicial tribunals, *and a decision upon the matter of right as* " *determined by the laws under which it vested*, according to the " course, mode and usages of the common law as derived from " our forefathers, are not effectually 'laws of the land' for these " purposes."

In the case of *Bank of Columbia* v. *Okely*, 4 Wheaton, 235. Mr. Justice JOHNSON, delivering the opinion of the court, and referring to the same words in the Constitution of Maryland, says: " As to the words from Magna Charta, incorporated " in the Constitution of Maryland, after volumes spoken and " written, with a view to their exposition, the good sense of " mankind has at length settled down to this, *that they were in-* " *tended to secure the individual from the arbitrary exercise of* " *the powers of government, unrestrained by the established prin-* " *ciples of private rights*, and distributive justice.

As already stated, the fixing of the maximum rates of storage in the 15th Section of the Warehouse Act, is an " arbitrary ex- " ercise of the power of government," limited in its application to a particular and specified class of powers, viz., warehousemen in the city of Chicago. It comes in the form of a mandate from the legislative authority, to a comparatively few citizens of the State, restraining them of their right of control over the uses and the value of the uses of their private property, and depriving them of privileges in respect to their property and services, which are fully enjoyed by the people of the State at large. It singles them out for legislative condemnation, and places them and their property under disabilities, such as the community generally are not subjected to. Is not this depriving them of property " without due process of law," and denying to them also " the equal protection of the law ? "

It is no answer to this to say that the Warehouse Law provides for a hearing of warehousemen, before they are condemned to the penalties and forfeitures provided in the act. The hearing which is allowed to them is but the mockery of a trial. The single and only question involved in such a hearing would be whether they have charged for the storage and handling of grain a greater price than that named in the act; and it would

be the same, no matter what that price might have been. Efforts have been made to defend it, on the ground that it was a provision intended to prevent extortion, and combinations for the purpose of extortion. But the sufficient answer is, that the act is not framed upon that basis, nor does it purport to be for any such purpose. A general law defining extortion or conspiracy for purposes of extortion, and providing penalties for those who may be guilty of such misdemeanors, it is undoubtedly competent for the legislature of the State to pass, but such a law would be necessarily very different in its provisions from the act under consideration. It would, at least, make some attempt to set forth the elements of extortion, in a manner capable of being understood. The fact that warehousemen charged two (2) cents storage for the first twenty days, as it is admitted the plaintiffs in error did, would, of itself, have no tendency to prove extortion, nor would the fact that the prices charged were such as had been arranged by consultation between the owners of the different warehouses, amount to a criminal combination for purposes of extortion. A reasonable price cannot be extortionate, nor can a reasonable act be oppressive. It is impossible, from the very nature of things, to conceive of an extortionate charge or act, unless it contains the elements of injustice or unreasonableness. Necessarily, whether an act is extortionate or oppressive, depends upon a multitude of circumstances, which can only be investigated and understood in a judicial way. The result must vary with the times and condition of things. What would be extortion or oppression to-day might not be next week or next year. The question is, therefore, judicial in all its properties and relations, and one of the chief elements in the determination of it, is whether the price charged or the act committed, had in it the quality of reasonableness. All such investigations are, by the constitution, reserved for the judicial department of the government, and this, in part at least, is what is intended by the constitution, when it says: "Nor shall any State deprive any person of life, liberty, "*or property, without due process of law.*"

If this is sound in principle, what can be said in justification of the empty form of a trial granted to warehousemen under the

Warehouse Act of Illinois? And what is the condition to which the courts are degraded in enforcing that act? As already stated, upon such a trial, the single and only question upon which their right to transact business as warehousemen, and to use their warehouses for warehousing purposes would depend, would be whether they had charged more for the storage and handling of grain, than the maximum price fixed by the law. The investigation is, by the law, stopped at its very beginning, and no defence is permitted upon the merits and justice of the case. It will avail the defendants nothing to say or prove, that the charges made, or the acts committed, were reasonable, or that they could not do the business for a less price, or do it otherwise than they did. Indeed, under the opinion of the majority of the Illinois Supreme Court, it will avail them nothing to prove that what they have done is perfectly satisfactory to their employers, and that the men who paid for the service, contracted for it, and for the rate of compensation in advance, and are perfectly content, both with the manner and the cost of the service. Some spy, in the open or secret employment of a meddlesome commission, has ascertained that the law of maximum rates has been violated; that by agreement, a warehouseman has sold his services and the use of his property for a larger price than the maximum fixed by an arbitrary and inflexible rule, an exercise of despotic power, and the penalty must follow. What, in such a case, is the office of the court, beyond that of merely executing the arbitrary mandate of the legislature? It cannot inquire into the merits or justice of the charge. It can only pronounce the legislative will, and enforce the legislative judgment. All its appropriate functions are usurped in the act itself, and it becomes the blind instrument of an arbitrary power, unless it has the manliness to assert its proper position as the expounder of the law, and the administrator of the justice of the State. The first principles of common honesty, as well as the fundamental maxims of free government, are outraged by the possibility, that such an enactment can have the force of *a law of the land.*

There is no place for such tyrannizing and unreasoning oppression under our constitution. If there is, then not only are

the wealth, the enterprise and industry of the country in the power of a disorderly mob, which is sometimes inevitable, but the private fortunes of citizens, for all purposes of use and enjoyment, are at the disposal of an assembly, organized and constituted under the forms of law, and invested with authority to absorb them by slow and gradual processes, into the public control and management, and the protection of the constitution is a sham and a delusion. It is respectfully submitted that such was not the intention of the framers of the constitution, and that no proper interpretation of it, can lead to such disastrous results.

Article XIII of the Constitution of Illinois, adopted in the year 1870, has this as the first section: "All elevators or "storehouses, where grain or other property is stored for a "compensation, whether the property stored be kept separate "or not, are declared to be *public* warehouses."

The Warehouse Act follows this definition of public warehouses, and in the course of this controversy, effort has been made to give some force to the word "*public*," as a constitutional prefix to the word warehouse. In this connection, it is confidently submitted that neither a State constitutional convention, nor a State Legislature, can impress a public character upon private property by a mere declaration; and that calling certain warehouses, public, whether in the Constitution or in the Act, does not, and cannot, in any manner, affect private ownership in them, and the right of private control over them. Considered with reference to the Federal Constitution, the Articles of the State Constitution, and the legislative enactment, are alike laws, and, alike subject to objections, on the ground of unconstitutionality. In support of this, I refer simply to the case of *Railroad Company* v. *McClure*, 10 Wall., 515, where this language is found: "The Constitution of the "United States declares that no State shall pass a law impair-"ing the obligation of contracts. The constitution of a State "is undoubtedly a law within the meaning of this prohibition. A "State can no more do what is thus forbidden by one than by "the other. *There is the same impediment in the way of both.*"

But it is asserted, in the opinion of the majority of the Su-

preme Court of Illinois, and was claimed by the counsel for the people, that laws analogous to this warehouse legislation, in their effect upon private rights, have existed in this country ever since the organization of the government, and that their validity under the United States Constitution has never been seriously questioned; and laws, regulating the rate of interest, the tolls of public mills and ferries, the weight and price of loaves of bread, and the municipal control exercised over hackmen and draymen in our larger cities, are referred to as analogous cases, supposed to justify the provisions of the Warehouse Act.

I shall not attempt any repetition of the clear and conclusive argument of my brother Goudy, pointing out the difference between the cases referred to, and the one here presented, and will simply add thereto this suggestion: that, if it were conceded, or successfully shown, that these instances of legislative interference in the private business of the citizen, were entirely similar in their character to the interference with the private rights and interests of warehousemen, attempted in the Warehouse Act of April 25, 1871, it might still be said of them, in all justice and truthfulness to history, that they have stood for nearly a century, as admitted exceptions to the principles upon which our government has been administered. They are not interwoven with, but only tolerated under, the new theory and ideas of protection to private rights, upon which this government was founded. So far as they can be properly said to be legislative restrictions upon the income, derivable from the services, and the legitimate use of the private property, of the citizen, they have stood as isolations, and as such proving most clearly that the general rule is not, and has not been, in harmony with them. They are the relics and implements of a former system, carried along by sufferance and general acquiescence, whilst the system of which they were a constituent part has long since been displaced, and its principles discarded; and the question would then be, whether our system of government should be remodeled upon the basis of these few exceptions, or the principles of the government, in their general application, be vindicated and sustained, notwithstanding the exceptions, which it tolerates and upholds. If, then, the Warehouse Act was, in its

provisions, parallel with the instances cited, that fact would furnish no rational argument in favor of its validity; and, in the confident belief, that it is unsupported by reason, principle or authority, it is respectfully submitted that the judgment of the Supreme Court of Illinois, should be reversed.

JNO. N. JEWETT,

Att'y for Pl'ff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1875.

IRA Y. MUNN and GEORGE L. SCOTT,

—VS.—

THE PEOPLE OF THE STATE OF ILLINOIS.

Further Argument for Plaintiffs in Error,

—BY—

JNO. N. JEWETT,

FOR PLAINTIFFS IN ERROR.

Beach, Barnard & Co., Legal Printers, 98 Randolph Street.

1875.

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} ERROR TO SUPREME COURT OF ILLINOIS.

FURTHER ARGUMENT FOR PLAINTIFFS IN ERROR,

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CHICAGO:
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ARGUMENT.

The proper interpretation of the law, whether constitutional or statutory, may oftentimes be found in the facts of antecedent history, and the inferences to be deduced therefrom. A large proportion of the modifications which have been accomplished, in the form, theory and practices of civil governments, have had their origin in dissatisfaction with the forms, theories and practices which preceded them.

This has been equally true, whether those modifications tended in one direction or the other. Despotism has as often succeeded what was called civil liberty, as the contrary; but whatever the change, whether ultimately productive of good or evil, there has generally been some real or fancied grievance in the old, which the new was intended to remedy; and when the purpose is honest, and the effort for improvement is made in good faith, the pre-existing evil invariably gives a point and application to the remedy adopted. Hence it is that in the construction of laws, when construction is deemed necessary to their proper understanding, reference is so frequently made to the condition of things existing prior to their enactment, and to the difficulties which they were intended to correct.

In all cases where governments have sprung from the will of the people, and the popular voice has determined both the form and the substance of them, and given expression to that will in written constitutions, it is easily practicable to point out the antecedent evils which they were intended to avoid, and the future good they were designed to accomplish. The degree of intelligence and good judgment of the people or their representatives, is then illustrated, by the skill and foresight manifested by them in shunning the dangers and difficulties of the past, and providing proper safeguards against their recurrence in the future. The organization of a government is simply a marking

out of the civil life of the people, and the establishment of an authority to prevent deviations from the appointed way. The evils to be avoided and the good to be attained, naturally suggest the direction to be taken and the limitations to be applied. A practiced surveyor, who should be entrusted with the task of re-locating a highway, rendered difficult and dangerous by swamps, and hills, and swollen streams, if he were a man of skill and judgment in his profession, would naturally be expected to deviate so far from the old route as to leave all the embarrassment of it quite outside of the new line; and the greater that deviation, the more clearly would be shown his determination to escape the obstacles to progress which the old way presented; and if, years afterwards, a stranger should examine the old and the new route, he would have little occasion to inquire for the purpose intended to be accomplished by the re-location.

So in respect to the reorganization of governments: every substantial change is a new departure from what had gone before; and the more radical the change, the more clearly is defined the purpose to root out of the system something which had previously existed there, and which it was deemed desirable to be rid of, and to substitute something in its place, which promised to relieve the future of the difficulties and embarrassments of the past.

For two centuries and upwards, prior to the organization of our government, and the adoption of our federal constitution, the crown and government of England had been speculating and experimenting upon the private rights and personal liberties of the subject. Legislation by parliament was practically without limitation or restraint. That body was as nearly omnipotent in matters of government as the genius of a constitutionally slow people would permit it to be without open resistance. Theoretically it was vested with absolute legislative power. There were traditional limitations, limitations from habit, custom and policy; but still, in its aggregated capacity, it represented the *power* as well as the wisdom and discretion of the nation, and its enactments were, without question, the law of the land. Froude says that it was the object of the English

government, during that time, simply to preserve the nation in the position it had already secured; that expansion, development and progress, were no part of their purpose. It is true that within the period referred to, the strict rules and discipline of the feudal system were gradually relaxing; but the theory of government out of which they had arisen, and which made that system practicable, binding the person, the property and the service of the subjects in successive gradations of rank, to the one absorbing purpose of defending the king and his prerogatives and power, still remained, and gave a character and direction to all the legislation of the realm, which had relation to the personal rights and obligations of the individual. As late as the reign of Queen Elizabeth, the sports and recreations of the people were, by act of parliament, required to be of a character calculated to qualify them for actual service in time of war. The manner in which land should be occupied and cultivated, was from time to time dictated by statute. It was forbidden to use more than a certain portion of it for purposes of grazing; and the merchants, who by superior enterprise, were beginning to absorb the wealth of the nation, and as incident thereto, were acquiring large interests in real estate, and devoting the same to the raising of flocks and herds, were, by act of parliament, compelled to desist, and to restore a large share of their acquisitions to the ordinary uses of agriculture. Acts of parliament also fixed the prices of wheat and other products of the soil, prescribed the kind of clothing the subject should wear, and the quality, if not the quantity, of food which he should eat. True, the historian says that some of these laws were rather an expression of what was deemed morally right, than of what could be specifically enforced; but even then, they serve to show the channel in which the government was running, the kind of arbitrary power it sought to wield over the rights and persons of the subjects, and the capacity which it had, or claimed to have, for the exercise of a petty tyranny, alike annoying to and destructive of personal independence and individual advancement.

Such exhibitions of governmental authority are, however, neither strange nor unnatural. The English government of to-

day is the outgrowth of the feudal system, which in the days of its grosser development and strength, divided the people into grades and classes, of all of which the king was the representative head. Each lower grade or class was in direct subordination to the one above it. The system itself has made great progress. One by one its coarser and more brutal features have disappeared. Villenage has been abolished in name, if not in fact. The good that was in it, has in great measure conquered that which was bad, and the idea of protection, always involved in it, has at last overshadowed and covered up the idea of subjection and subserviency, and now gives a tone and complexion to the civil and social relations of the people, which three centuries ago, they did not have. But it is still the same government, grounded upon the same theories, preserving in modified form the same distinctions, and holding in name, although in the main refraining from its irritating and oppressive exercise, the same power theoretically over the lives and fortunes of its subjects.

The circumstances which led to the separation of the American colonies from the mother country, were at the time of the adoption of our federal constitution, a recent illustration of the lurking power of the feudal principle in the English government. The cause of the separation was not so much the hardship or oppression resulting from the particular instances of the exercise of that power, as the existence of the power itself. The colonists claimed that they were British subjects, and entitled to all the rights and privileges which British subjects elsewhere possessed. The pith of the complaint was, that they were discriminated against in the legislation and policy of the country; that the resident power of the government, its traditional and hereditary power had been exercised against them in an unusual manner, and to their disadvantage, individually and collectively. That the power existed in the English system to legislate thus, was scarcely doubted, certainly not by the great body of British statesmen, although amongst the colonists there was much diversity of opinion as to the propriety of its exercise. It was exercised, however, and the right to its exercise was sought to be sustained by the whole power of the nation, and

hence rebellion and final separation. The evils of the English system, in this particular, were brought vividly before the minds of the American people, and in opposition to them they endured the hazards, hardships and privations of a tedious and exhaustive war. The government claimed and exercised the right, clearly pertaining to it under the feudal regime, to dictate as to the private interests of the subject, to quarter troops upon him in times of peace; to subject him to vexatious and troublesome searches and seizures; to impress him into the service of the army and navy, to deny him the privilege of a trial before a jury of his peers, when accused; to refuse him representation in the legislative body of the nation, and in other ways to hold him in subjection to the central power. If it had not actually appropriated the private property of the subject, confined him in dungeons upon mere suspicion and without trial, and reduced him to the condition of a slave and a dependent, it had done those things which manifested the possession of the legal right to do so, and an inclination to claim and exercise that right according to its own caprices.

Under such a rule, the subject was the slave of the government, and living in daily apprehension of the worst acts of tyranny and oppression. Private rights, as we understand them, could not exist, and private property could not be respected because of the uncertain tenure by which it was held. Remonstrance was ineffectual, and nothing remained to the people but submission or revolution; and revolution came, and after it a new government; new in form and new in principle; the theory of which is that governments are created by and for the people, and not the people by and for the governments.

It was shortly after the events thus briefly alluded to, that the federal constitution was adopted. The men who drafted it and the people who ratified it, had been, many of them, active participants in the struggle against the British crown, and were therefore fully alive to the dangers of establishing an absolute and irresponsible authority, over the private as well as the political rights of the individval members of the civil society. That was one of the evils against which they had protested and

fought, and was naturally, therefore, one of the perils which they would seek to avoid.

The very preamble of the constitution, setting forth distinctly the purposes had in view, is full of practical suggestions in this regard. "To form a more perfect union, establish justice, "promote the general welfare, and secure the blessings of "liberty to ourselves and our posterity," were the declared objects for which the constitution itself was made; and, although this general language is broad enough to embrace, and confessedly does include interests of a political character, and rights pertaining to the people in their aggregated capacity as a nation, still it cannot be doubted, that it was intended to and does include, also, rights and interests which are purely personal and which pertain to the individual man, as an integral part of the political society. The provisions of the constitution clearly import this, for under it, the man, who was before a "subject," a name significant of subordination and subserviency, becomes at once a "citizen," with an equal and independent personality, discharged of the very idea of servitude to any, and holding himself and his possessions by the same tenure and right as all his fellows. The very name thus given to him, implies equality of rights and privileges. But care was taken that those rights and privileges, and the protection of them, should not be left to implication. They were spread out and stamped indelibly upon the face of the constitution itself, and the earlier amendments thereof. Amongst the rights and privileges thus guaranteed, are *freedom* of religion, freedom of speech, freedom of the press, the *right* of peaceably assembling, the *right* to petition for redress of grievances, the *right* to keep and bear arms; *exemption* from the burdens of a soldiery in times of peace, and in times of war also, except as provided by law; the right to be secure in person and property against unreasonable search and seizure; the *right* of trial by jury; the right to life, liberty and property, in the broad sense, that no person should be deprived of them, except in accordance with such general rules as should have application to the whole community; and the *right* to hold and own property as against the sovereign power itself, unless it should be required for the public use, and just compensation

should be paid therefor. All these are provisions relating to the rights and privileges of the individual citizen. They are personal in their nature, and the idea of an American citizen is sadly incomplete without them.

Why was so much space given to these matters of a purely private and personal nature? The reason is found in the fact, that the public dangers from which the people had just emerged, had threatened them through the individual; that tyranny and oppression are personal in their application, whatever universality of form, they may put on; and in this further fact, that experience and observation had taught this lesson, that it was safer and better to build up the government through the citizen, than it would be to erect it upon the necks of subjects. The distinction is important, and marks the dividing line between the theory of monarchical government, and the theory of what this nation claims to be—a republic.

Having these principles of government thus clearly announcd in the fundamental law, which can not be violated by legislation, the only difficulty which can or ought to arise, upon the presentation of any special case, in which they are claimed to be involved, is as to their application. The principles themselves are fundamental. They are assential parts of the theory of the government, violations of which can not be tolerated. They inhere in the system as parts of its very spirit and substance, without which the system itself becomes a mere lifeless formality, and may drift anywhere, and everywhere, to anarchy or despotism. Strike out of our constitution its guaranties for private rights, or allow them by neglect or disuse to become inefficient and inoperative, and wherein are we advanced beyond the old and discarded systems which preceded us, and from which we claim to have made a wide and radical departure? Leave them out, and we are traveling in the same direction which they were pursuing—a little more elevated in tone and pretension, it may be—making a boast of turning our backs upon the difficulties and dangers of the old way, while in fact we are merely suspended above them, and that too only by a rotten and unsubstantial net work of *pretensions*, which may, at any moment give way, and precipitate us into the very midst of the troubles

which we have been congratulating ourselves upon having so skillfully avoided.

It is true that all these provisions of the federal constitution, thus far referred to, relating to the private rights of the citizen, and their protection, have been held to be limitations upon the power of the federal government only. And I also recognize the fact, that this court, upon the review of cases from the State courts, does not undertake to revise decisions based upon the construction of State laws, or constitutions, which do not involve the question of violations of the federal constitution, or laws passed in pursuance thereof. This, however, is immaterial to the present purpose. The question now is one of principle, inhering in the very spirit and substance of our institutions, and involving the theory of government, of which the constitution is only the expression; and, in this view, it is entirely proper to refer to the limitations upon federal power, and also to the constitutions of the several States, and amongst them to the constitution of the State of Illinois, for the purpose of showing that the principle contended for has had universal recognition in the fundamental laws of the nation, and of all its constituent parts.

There is, I believe, now in force, no State constitution which has not been adopted since the adoption of the federal constitution, and the first 12 articles of the amendments thereto; and it is entirely safe to say, that all of these State constitutions, whether new or old, contain in substance, and many of them in identical words, the provisions of the federal constitution, to which reference has been made. This is certainly true of the several constitutions of the State of Illinois, the provisions of which are set forth in the printed argument already on file.

The departure of the national government from the former systems and theories, has, therefore, been literally followed by the governments of the several States. Protection to private rights, and private property, has been interwoven in the theory upon which all these governments have been organized—a clear evidence of the intention of the people, that opposition to arbitrary governmental interference with the personal rights, and private property of the citizen should not be a merely transient proviso—but rather that it should be an abiding principle; and for

that reason it has been perpetuated by the most solemn forms of organic law; and as a principle, it underlies and supports the structure of our complex government, and is doubly guaranteed, and made perpetual by the concurrent provisions of both State and federal constitutions.

To overthrow this principle, or to disregard it, would be to subvert the very purposes for which the federal constitution was framed, as expressed in its preamble. It would be to overthrow justice, as expounded by that constitution, instead of establishing it; to disturb the domestic tranquility, instead of insuring it; to retard the general welfare, instead of promoting it; and to destroy the blessings of liberty, instead of securing them.

In saying this, it is assumed, of course, that the means provided in the constitution, for the accomplishment of the purposes set forth in the *preamble*, were well selected; that the instrumentalities chosen were adapted to the attainment of the results aimed at.

We should do small credit to ourselves, and the American people of this generation, by finding fault with the provisions of our constitution in this respect. They have been tested by an experience of nearly a century, during which time justice has been well administered, domestic tranquility has been enforced, the general welfare has been promoted, and the blessings of liberty have been enjoyed. Under the protection of these influences, the progress and development of the nation, and of the individual citizen, have been without rivalry or example in the history of the world. The means were adapted to the ends to be accomplished, and in proof of this, we have but to point to results everywhere about us. It is, and has been, the sense of personal independence, liberty of thought and action, the right to the enjoyment of life, liberty and property, and the privilege of controlling the accumulations of individual industry and enterprise, which have inspired the people, and made them capable of achieving results, astonishing to all the world besides. The spirit, begotten of an assurance of these rights, has been the life and stimulus of the people, individually and collectively. Industry has been developed into enterprise, resolution has grappled with difficulties apparently insurmount-

able, gigantic labors, formerly deemed possible only through governmental agencies, have been undertaken and accomplished by individual citizens, and improvements of a public character, of public utility, and public necessity, have owed their origin and successful accomplishment to the energy and genius of the people in their individual capacities. The work of the nation has been performed by the private citizen, and why? Simply because the constitution of the country, the very principles upon which the government was founded, the spirit and substance of our institutions, were always understood to be so many guaranties, that the individual citizen should be protected in the results of his labors, that he had a private interest, and a private property in the achievement of his hands; and that these interests were under the protection of organic laws, which could not be altered. Because, in other words, constitutions, both State and federal, have said, amongst other things, that "no man shall be deprived of life, liberty or property, without "due process of law; nor shall private property be taken for "public use, without just compensation."

The progress and development of the country, the general growth and prosperity of the nation, the common feeling and sentiment of the community, the surprising energy and enterprise of the people individually, have given a practical interpretation to these constitutional provisions entirely in harmony with the purposes declared in the preamble of the constitution, and which this court, so far as I am aware, has uniformly and consistently acquiesced in and upheld.

Is nothing due to this universal understanding of the scope and meaning of the organic law and to the acknowledged spirit and purposes of the government and its institutions? Have the people themselves been deceived, and have citizens only labored that their private accumulations should be made the sport and football of the political power? Have they toiled that others may reap the harvest? Shall a legislative enactment which contravenes the very spirit and substance of the constitution, as generally understood, and violates the rights of the citizen in their most vital part, be held to be valid, simply because the language, which forbids it specifically, cannot be read from the

face of the constitution itself? Is the constitution a thing of dates, details and examples only, without life, comprehensiveness, or principles? Does it rest in words merely, and not at all in purpose and spirit? Experience, the genius and conduct of the people, contemporaneous and subsequent interpretation, and the whole power of the nation, on more than one occasion, have answered these questions in the negative. The constitution is a thing of life; it has vital forces equal to all the emergencies of the people, individually and collectively, and its purposes are not accomplished, unless its protection reaches to the rights and interests of each one, as well as to the rights and interests of the collective whole. When it says that no man shall be deprived of life, liberty, or property, without due process of law, and that private property shall not be taken for public use without just compensation, it but announces a principle upon which the government rests as a chief corner stone. It supports, not only what is directly above it, but also lends its strength to all the superstructure, and each and every part of it. The protection to private property thus guaranteed, extends not only to the property itself, but to all the essential interests and incidents of property. The term is generic, and attaches to everything in which a property interest may exist, and to every incident of that thing, of which the idea of property can be predicated. In this country property is measured by values, and values are determined by results, denominated income; hence results, or income, is an essential element of property, the destruction of which is a destruction of the idea and substance of property itself. If this is true, and reasonable argument to the contrary may safely be challenged, then the values of property, its results and income are, and must be, within the protection of the spirit and of the letter of our constitution, and of the fundamental principles which underlie the theory of our government.

It is a remarkable fact, but doubtless true, as affirmed by Froude, that in all the speculations and experiments of the English parliament upon the private rights and private property of the subject, the rentals or income from real estate were left untouched. This species of property seems to have been

regarded as of too high and sacred a character to admit of even parliamentary interference. It may possibly be suggested, that this exception was dictated by the personal interest of the legislators themselves, who were, in great measure, taken from the landed gentry of the realm, and, therefore, had a personal interest in preserving intact the revenues derivable from this source. The criticism, if made, may be just; but, even if it is, it contains no argument against the principle I am contending for, viz: exemption of private property from legislative control, because it is not to be supposed, that it was the purpose of the framers of our constitution to discriminate against any class of property simply for the reason that it had been left free and unincumbered by the English government. This exemption from parliamentary interference may argue either a respectful recognition of the importance of leaving the rents and income of real estate to self adjustment under the general influences of the market, or it may show only that legislators, like other people, are careful in respect to their own personal interests; but in either case, our constitution was designed to sweep away all such distinctions, to put all property rights upon the same broad foundation, and to furnish protection without discrimination, and upon the theory that all men are created equal, and are endowed by nature with certain inal'enable rights.

I am aware that there is a division of authority upon the quesion whether courts can or will take notice of the repugnancy of legislation to the spirit and theory of a government, when no direct violation of the written constitution can be pointed out; but it would seem that the courts, which have adhered to the negative of this question, have not well considered in what the vitality and force of a written constitution consists. It is not a code of laws reaching out to the details and incidents of civil society, but simply an enunciation of the broad principles upon which the fabric of civil society rests, and in pursuance of which its affairs must be administered. To construe the language in which these principles are expressed narrowly, is to deprive the principles themselves of their efficiency. Principles are of universal application. Mere rules or regulations may, and frequently do, have their exceptions, and still the rule and the ex-

ception may be in harmony with the general underlying principle. To suppose an exception to a principle, is to destroy the principle itself. To illustrate: Assume, if it cannot be admitted, that protection to private property is a constitutional principle, in pursuance of which legislation must be had.

Laws are passed, authorizing A's private property to be taken in payment of his debts. Whilst A's private property is thus apparently invaded, the creditor's property in the debt owing by A is protected and enforced. Again, under the police power, A is forbidden to use his private property in a manner injurious to the public health and morals. *Sic utere tuo, ut alienum non lædas.* The maxim and its enforcement are apparently an infringment of private rights, but thereby the private rights in adjacent property are effectually preserved. In all such cases, it is easy to see, that the exception is still in conformity to the general principle which we have assumed. But, take another case. The right to the use and enjoyment of private property, the right to fix a value upon it, and upon its use by others, are parts of the very essence of private property. They are the elements which go to make up the very idea of property, and without which the thing itself ceases to be either useful or desirable. A owns property, which he is using in a manner and for purposes wholly unobjectionable. It is neither injurious to the public health, nor to the public morals. It is not a nuisance, in any sense of that term. Legislation comes in, and says that B shall have the right to use that property, on specified conditions. B has no right to A's property, and therefore no right to be protected by such a law; and yet, A's property rights are invaded. Such a law, if law it could be called, would be in direct violation of the principle of protection to private property, and either the principle or the law must give way, because of this antagonism.

It is insisted that the Illinois Warehouse Law is of the latter class, in those particulars in which it is here objected to. It does not undertake to say that the warehouses, or the warehouse business, is a nuisance, nor in the objectionable sections does it pretend to regulate the manner in which the business shall be

carried on. It even attempts, in some of its parts, to throw protection around the business, as though the public were desirous of its continuance in the usual way. It evidently contemplates its continuance, and its continuance is, in some sense, a public necessity; but while doing this, it strikes a blow, if it shall be sustained, with fearful certainty at the very foundation of private rights in private property. It announces the doctrine that the public, or the legislature on behalf of the public, may usurp the private rights of the citizen, and take from him, one by one—or in the mass, it may be, all the elements which make up the idea of property; that he may be stripped of his property in the profitable use of his private estate; fixes a value upon the work of his own hands, and the product of his own brains, and says that at such a price, they may all be enjoyed by others, or that they shall not be enjoyed by him. This is destructive to property interests; it is destruction to all enterprise; it is death to the principle of protection to private rights. If the constitution cannot prevent this, it is a failure in one, at least, of its most essential purposes, and a legislative despotism is erected inside of institutions professedly republican.

But even if the constitutional construction, thus far contended for, cannot be successfully invoked in behalf of the plaintiffs in error in this court, and if this court is unable, under the general principle of protection to private property, upon which the government was founded, to compel State legislatures to respect private rights, here so glaringly invaded, we still insist that we are not without the pale of constitutional protection, and that the remedy for our wrongs is within the power of this court.

The 1st section of the 14th article of the amendment to the federal Constitution was in force when the Illinois Warehouse Law was passed, and that provides that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

It has been said, that this section of the constitution was made solely for the benefit and protection of the negro race, and the majority of the Supreme Court of Illinois seem to have imbibed that absurd idea. It cannot be so unless there is, in this coun-

try, one constitution for black people, and another for white, and that will not be contended. There is no objection to a reference to particular evils. prominently before the public mind, leading to the adoption of this article of the constitution, for the purpose of arriving at its proper interpretation. Indeed, I have, in this argument, endeavored to show that such a reference is legitimate, and in some cases necessary. But if I am not altogether mistaken in my apprehension of the force of language, a construction of this constitutional amendment, once arrived at, becomes universal in its application. The recently emancipated slaves were especially in a condition to need protection, in their civil and property rights, against invidious and discriminating State legislation. Their status, as citizens, was neither recognized, nor fixed by law, and the States in which they had resided as slaves, were scarcely willing, voluntarily, to elevate them to an equality of civil and political rights. This was the occasion for adopting this amendment to the constitution; but the amendment, as adopted, embraces everybody. It is as broad as humanity, and the jurisdiction of the nation. Neither white men nor colored can monopolize its benefits, for it is without distinction of race or color, or previous condition of servitude. Admit that the condition of the colored race presented an illustration of the necessity for prohibiting State interference with individual rights, the prohibition once made, in terms of general import, becomes at once of universal application. It is by no means uncommon for a single case of hardship to suggest amendments to the law; but the law, when passed, unless limited by itself, applies not only to the special case which suggested it, but to all cases of a similar character. There can be no reasonable doubt, or argument contrary to this.

As thus applied, what does this constitutional provision mean? The words, " due process of law," have been so often before the courts, that it is not proper to discuss their import. It is amongst the elements of legal learning. They are words of " Magna Charta," and are of the same significance here as in England, the only difference being, that in " Magna Charta," their force, or existence even, may be broken or destroyed by act of Parliament, whilst in our constitution, they are placed

beyond the reach of legislation, and can only be displaced by constitutional amendment. In addition to what has been said in the printed argument on file, as to the meaning of these words, it may be proper to say, that by them, the States are prohibited from depriving any person of life, liberty, or property, by legislation merely, or without the ordinary trial or judgment of the courts.

We then come necessarily to this point of inquiry, viz., what is the office of a court, under our constitution, and form of government ?

As already argued in print, the division of the powers of government, into executive, legislative, and judicial, indicates, that that there must be a limitaiton upon the powers of each of these departments. Usurpations of the one upon the rights and privileges of the others, cannot be tolerated, otherwise the three become consolidated in the one. The legislative power represents the politics of the State or nation, and is in its nature aggressive, and the rules and regulations which it adopts, are to be enforced by the executive, so long as they are valid. But the clause of the constitution above referred to, has interposed the judicial power between the legislative and executive on the one side, and the individual citizen on the other, in all matters pertaining to life, liberty and property. The principles upon which these several departments of government act, serve in a general way, to point out their boundaries. These are respectively, *force*, *expediency*, and *right*, and the courts, as exponents of what is right, as distinguished from that which is merely expedient, are especially the guardians of the private property, as well as the life and liberty, of the citizen. It is to them, that he must look for assurance of that protection which the constitution guarantees. The courts must fix a limit to expediency, as a principle of legislation, and in doing this, they also prescribe a limit to the exercise of executive force.

The Illinois Warehouse Law trenches upon the office of the judiciary, because it assumes to fix arbitrarily, and without "due process of law," a standard of right, in private property, as between the citizen and the public, and requires the court to sanction and enforce a decree of pretended legislative expediency,

without permitting to the judiciary the determination of the question of right. Is it denied that a man, and a citizen, has property in the labor of his hands, and in the results of his individual capacity? If the denial can be supported, then is the citizen a slave to something, or somebody, for that is one of the essential conditions of slavery. A man has property, in the broad and constitutional sense of that term, in every thing he possesses, which is of value to him, and also in all the capacities with which he is endowed, or which he has acquired, and subject to the rules already adverted to, has a right to the control and beneficial uses of that property. This property, the constitution says, shall not be taken from him without "due pro-"cess of law." I am unable to conceive of the blundering stupidity which shall say, that because his capacity for labor, and the physical power to hold possession of a thing called property, are not taken away from him, therefore, he is not deprived of his property. Can the legislature say that services of a free citizen, worth in the market $1,000, shall be rendered for $100, and that the annual rental of property worth $5,000, shall be reduced to $500; and impose fines, penalties, and forfeitures for receiving higher prices than those fixed by it?

And can this be done in respect to a particular class of citizens, or citizens pursuing a particular business or employment, and in respect of property used for a specified purpose? In all such cases, the real question is as to the existence of the power, and not of the degree of its exercise. If it is admitted that legislation can fix one price, it must be admitted that it can fix any other. The power is unlimited if it exist at all; for who would be bold enough to affirm that if legislation can fix one maximum it may not fix another, and if it may fix a maximum why may it not fix a minimum, and by fixing it too high, compel the individual citizen to hold all of his property without conversion, whilst his neighbors have free use of the market?

If the value of the services of the individual citizen, coupled with the use of his private property, may, by legislative enactment, be adjusted at $10 per day, where is the constitutional or other limitation, which would prevent its adjustment by legislation at one cent per day? and is there any man on earth mean

enough to say, or of comprehension so warped and twisted as to believe, that if services and the use of property of the market value of $10, in the absence of legislation, is, by legislation, reduced to one cent, property is not taken,or that the owner is not deprived of property? Might not legislation as well wipe out the remaining one cent, and thus annihilate the very idea of property in the service and thing referred to? Why not obliterate the last cent of values as well as the first, or the first 999, and absorb the services and the private property of the citizen at once into the public use?

Where is the limitation that saves to the citizen one half the values, or even nominal values in his private property, and puts all the remainder of it at the risk of hostile legislation and State usurpation? There is none. The power is broad and sweeping, or there is no such power. It runs along with all interests and all rights, or it runs with none. It is omnipotent, or else it it a myth, a creation of excited fancy, a political monstrosity, to be dispelled by the first ray from the sunlight of reason, which shall fall upon it.

The Illinois Warehouse Law assumes the existence of such a power in the legislature of the State; for it not only attempts to fix maximum compensation for the services and the use of the property of the citizen, but also to deprive him of the use of his property for warehousing purposes, unless he complies with the terms prescribed, since the court will perceive by reading the enactment—*the thing* called a law—that the punishment for its violation is not merely a fine of $100 per day, but may also extend to a personal disqualification to engage in the warehousing business. It even goes farther than this in its assumption of legislative power and disregard of constitutional limitation, for at the foundation of this monstrous claim of power to fix prices and impose disabilities, must lie an assumed public necessity for the use of warehouse property, and constitutions, State and Federal, say that private property shall not be taken for public use, without just compensation.

This idea is covered up in the deceptive phraseology "public warehouses," and by these talismanic words the law attempts to open private property to general or public use, upon

such terms as the public, represented by the legislature shall prescribe. Can there be a more abject and degraded condition of private property rights, than is involved in the mere statement of such a proposition?

In the political arena of this nation, it is not to be expected that all interests and pursuits will be found in practical harmony. The struggle for political supremacy between different interests and classes, into which the people are necessarily divided, has always marked our history, and probably always will. Such struggles are incident to our system and organization. They belong to popular elections. In the past, many of the questions of difference have been largely theoretical, and it mattered little to any one, upon which standard victory perched. In later years, however, and with increase of population, have come a restless, feverish distrust, a monomania for political power, an apparent division and separation of interests and organizations based upon pursuits, and from these have been evolved political issues which are intensely practical. It is immaterial that these issues are false issues, that the differences and antagonisms which are set up, are mere pretensions. Sooner or later it will have to be admitted that issues are made and not born, and that judgment and discretion do not, of necessity, reside in the multitude; and yet the multitude, *the people*, which means the majority, it is said, must control. What must be the result? If these organizations and influences are to control in legislation, then the rules and regulations respecting private property and the right to its enjoyment and use will be fluctuating continually, as the one or the other of the contending factions acquires the supremacy. As each in turn prevails over the other, it will take control of the rights and interests of *that other*, absolutely and despotically. Harmony, consistency and stability do not belong to the vocabulary of such a government.

Rights are dependent upon the results of political elections, and revolutions of property rights come with every change of administration. The man of fortune and income to-day, will be a pauper to-morrow, because the class or profession to which he belongs will have passed out of power, and the use of his property will have been transferred to the public, repre-

sented by the successful party, upon such terms and conditions as they may choose to prescribe. All this is true, unless there is a power somewhere to regulate and restrain these restless and swaying elements of our political life.

It is useless to raise up argument against the probability of such results, for the question is, are they possible? Is there, under the constitution, authority for such legislative exactions? If the door is open, people will be found to flock to it, and even to experiment with the chaos and confusion which lie beyond it. Is there no power, except in the will of the majority, behind which private rights and private property may shelter themselves, and be safe? There is none, unless it resides in the judiciary. If this fails, then all is lost. It is conceded that this department of the government must have some authority for the possession and exercise of such a power. This authority, if found at all, must be found in the fundamental principles of the government itself, in the distribution of the powers of the government, and in the express provisions of the constitution, which say that private property shall not be taken for public use, without just compensation, and that neither the nation nor the State shall deprive a person of life, liberty or property, without due process of law; nor shall any State deny to any person within its jurisdiction the equal protection of the laws. These principles and provisions are under the special guardianship of the courts, and from them they derive all needed authority to protect private property and private rights against the encroachments of legislative power.

But it is said, and learnedly argued, that warehousemen in Chicago are exercising a public offic; that the method of transacting the grain trade makes warehouses, like that of the plaintiffs in error, a public necessity; that the Illinois constitution has made them public warehouses, and stamped them indelibly as a part of the public interest, subject to the public control. That is begging the whole question. I am not attempting to argue that warehouses are not a public necessity, nor am I now opposing the theory that the State may, under the eminent domain power, acquire this property for the public use, upon making just compensation therefor; but who, until now, ever heard of

making private property public by a constitutional or legislative declaration? What I object to is the stealing of this property by the State—the commission of grand larceny by the public, upon the property and property rights of the citizen. The State is too proud to beg; too poor to buy, it may be; it ought to be too honest to embezzle or purloin what does not belong to it, and what it does not propose to pay for. This property, like all other, is subject to the exercise of the power of eminent domain, and it may be, that the case made by the learned attorney general, would justify the exercise of that power upon it, in the way provided in the constitution; but even this power cannot reach the services of the citizen. It exhausts itself upon the tangible thing, and cannot be made to cover the thing and the services combined. To a public office, as such, the government may fix a compensation such as it chooses, and if the citizen accepts the office, he must abide by the compensation. But is it within the scope of legislative power to make a private business a public office, and private property the seat of its exercise, and then impose terms thereon? To this extent must the argument go, or it must be abandoned for the purposes of this case; and it must reach out to other pursuits, and not confine itself to warehousemen. The entire community are interested in the trades and employments of the cobbler and the tailor. Declare them by constitutional provision or legislative enactment, to be public officers, and we have then, public cobblers and public tailors, with compensation fixed by law. The ridiculousness of this result may be no argument against its possibility; but the bare statement of it is as shocking to the sense of a free people, as the idea of it is repugnent to a constitution which does not permit slavery or involuntary servitude, either to the public or to the individual, except as a punishment for crime.

Nevertheless, this is the exact and literal meaning of the warehouse law, if as a law it is valid. The theory upon which it is founded, borrowed from the arguments of politicians, and illustrated upon banners borne in political processions, is accurately stated by the learned judge of the Illinois Supreme Court to whom belongs all the honor of the majority opinion, when he says, in substance, that anything is within the scope of

legislative power which, in the opinion of the legislature itself, will produce the greatest good to the greatest number. It is respectfully denied that the principle there announced ever has been or ever can be sustained, in its application to legislation of this class. It is false in theory, opposed to the spirit and letter of our constitutions, State and federal, repugnant to the fundamental axioms of all free governments, subversive of the social and political equality of the citizens, and contrary to the principles of natural justice and equity. There is no outrage upon private property rights which might not be perpetrated under it. It would justify the absolute appropriation of individual property to the public use, or a division of it amongst the multitude.

If a law was passed to divide up the property of every citizen worth $500,000, amongst those who had no property interests, this would give 1,000 citizens $500 apiece. The loss would be the loss of a single citizen—the gain would be to a thousand. If property is a good, then such a division would be accomplishing the greatest good of the greatest number; and if so, then the controlling principle of legislation, under which the Supreme Court of Illinois has justified, or attempted to justify the warehouse act, would justify such legislative distribution. It is not possible to imagine such a law to be valid under our constitutions. But would it help out such an enactment, to leave to the courts to determine the single question, whether the citizen had property of the value of $500,000, and to enter the decree of confiscation? Would such a provision avoid the constitutional objection that by the law private property was taken for the public use, without just compensation, and that it deprived the citizen of his property without due process of law?

But, what is the difference in principle, between dividing up the property of a citizen, and dividing up the uses and income of that property? True, the naked property, the unprofitable *res*, might, in the one case, remain to him, upon which he would have the gracious privilege of paying taxes and assessments for the support of a government which had robbed him of the very means out of which such payment should be made. The prac-

tical benefits of ownership would be destroyed by imposing upon the property a public easement, which would reduce it to a mere thing, from which no valuable results could be derived.

But, it is said, and so the argument runs, that the plaintiffs in error are not obliged, by the warehouse law, to permit the public use of their property; that they may close the doors of their warehouses, or devote the property to other purposes, not yet invaded by legislation. It might be a curious and interesting study to inquire into the constitutional difference between the warehouse law as it now is, and as it would be if modified so as to compel the continued use of warehouses for warehousing purposes. It might also be interesting to speculate upon the probable length of time which must elapse, if this warehouse law is valid, before the other uses to which the property might be diverted, would be made public by legislative declarations, and the multitude be let in to enjoy its benefits. But all such study and speculation is rendered useless here, by the fact that the warehouses which are the subject of this enactment are incapable of conversion to any other profitable uses. So much is admitted in this case to be within the knowledge of the court, that it may fairly be assumed that the court judicially knows that a grain warehouse, as such houses are constructed in Chicago, is absolutely good for nothing, except the storage of grain. It is built, from bottom to top, of solid planks or timbers, bolted or spiked together, running lengthwise and crosswise of the entire structure, and dividing the whole interior into bins, from six to twelve feet square, and from fifty to sixty feet in depth, each holding from 5,000 to 10,000 bushels of grain. For any other purpose now known, they are absolutely worthless. The lumber contained in them would scarcely pay the expenses of tearing them to pieces. In Chicago they are made to hold from 600,000 to 1,600,000 bushels, and are erected at a cost of from one to three hundred thousand dollars. When warehousemen, then, are tauntingly told that the law does not compel them to be warehousemen, or to use their property for warehousing purposes, they are simply advised that the law permits them to allow their property to lie idle, and rot down before their eyes, for this is the practical ef-

fect of closing it to this, the only useful purpose of which it is capable.

But I am aware, that there should be some reasonable limit to discussion by counsel, in every case, however important it may seem. The subject involved in this record, and which the court has now to consider, presents a field for argument and illustration which is well nigh illimitable. It is comparatively immaterial how this particular case shall be ultimately determined in its direct application to the property and parties named in it; but there is a wider application of the principles which shall be established by the final decision, which embraces all the private interests of all citizens within the jurisdiction of this court. That decision, if made upon the merits of the cause, will open wide the door for legislative control over the private rights of the citizen, subjecting them to the vascillating influences of political power, and practically bringing them within the reach of all the petty strife and confusion of party politics, or it will close that door forever. In its far-reaching consequences for good or evil upon all the industries and enterprises of the country, this cause may well take rank with the most important which this court was ever called upon to determine. The Dartmouth College case decided a question of vast importance to one class of private property only. The rule which it established adverse to the pretensions of legislative power in the States, has successfully held in check all the efforts of radical politicians and crazy communists, who have, from time to time, sought to make capital for themselves by the overthrow of the financial interests and credit of the country. Its results have more than justified the policy of that decision,even if policy could be supposed to enter into the decision of any judicial question, and the grounds for that decision were much less substantial than they are; and to-day but few can be found, whose opinions are at all entitled to respect, to question either its justice or expediency.

The attempt here made to enlarge the legislative power of the State, so as to bring within its control and regulation all the private interests of the citizen, and to make his property rights and income subservient to the capricious action of political ma-

jorities, is eminently deserving of the same fate. It may safely be affirmed, that it was never the intention of the framers of our constitutions that the business of the country should be embarrassed, and its private enterprises destroyed, by special and unfriendly legislation. Such incidental disadvantages as may, from time to time, result to individuals from the operations of general laws, affecting the whole community, must of course be borne, or their effects overcome. To this extent the individual surrenders his absolute rights, by becoming a member of the civil society. But that is a thing far different from singling him, his business and property, out from the whole mass of the community, and placing them under special and onerous regulations, affecting the value of his services and the results of his enterprise. Legislation of this latter class is personal and discriminating. It is an attempt to revive the old theories of the power of the government over all the rights and interests of the individual subject, which our constitution was intended to sweep away. The advocates of such a theory, be they ever so numerous, must ultimately find that it is not suited to the spirit and genius of a people educated under free constitutions; and though clamoring for it in the name of liberty, that it had its origin and development in the darkest and dreariest days of popular oppression. And even if they should succeed in planting temporarily upon the outermost verge of legislative power, some sickly representative of the dangerous doctrine for which they contend, the result will only show, that "institutions may be re-"stored in theory; but theory, be it never so perfect, will not "give them back their life," and the tottering and lifeless excrescence will sooner or later tumble to its fall, or be pushed disastrously from its narrow resting place. The best good of the civil society will then be accomplished, if all such disturbers of the public repose, shall be buried forever beneath the ruin.

JNO. N. JEWETT,

Of Counsel for Plaintiffs in Error.

APPENDIX.

AN ACT to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to Article XIII of the Constitution of this State. Approved, 25 April, 1871. In force, 1 July, 1871.

SECTION 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly*, That public warehouses, as defined in article thirteen of the constitution of this state, shall be divided into three classes, to be designated as classes A, B and C, respectively.

§ 2. Public warehouses of class A shall embrace all warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators or granaries being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration.

§ 3. The proprietor, lessee or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the circuit court of the county in which such warehouse is situated, a license, permitting such proprietor, lessee or manager to transact business as a public warehouseman under the laws of this state, which license shall be issued by the clerk of said court upon a written application, which shall set forth the location and name of such warehouse, and the individual name of each person interested as owner or principal in the management of the same; or, if the warehouse be owned or managed by a corporation, the names

of the president, secretary and treasurer of such corporation shall be stated; and the said license shall give authority to carry on and conduct the business of a public warehouse, of class A in accordance with the laws of this state, and shall be revocable by the said court upon a summary proceeding before the court, upon complaint of any person in writing, setting forth the particular violation of law, and upon satisfactory proof, to be taken in such manner as may be directed by the court.

§ 4. The person receiving a license as herein provided, shall file with the clerk of the court granting the same, a bond to the People of the State of Illinois, with good and sufficient surety, to be approved by said court, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman of class A, and his full and unreserved compliance with all laws of this State in relation thereto.

§ 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein provided, or who shall continue to transact any such business after such license has been revoked (save only that he may be permitted to deliver property previously stored in such warehouse), shall, on conviction, be fined in a sum not less than one hundred dollars, nor more than five hundred dollars for each and every day such business is so carried on; and the court may refuse to renew any license, or grant a new one, to any of the persons whose license has been revoked, within one year from the time the same was revoked.

§ 6. It shall be the duty of every warehouseman of class A to receive for storage any grain that may be tendered to him, in the usual manner in which warehouses are accustomed to receive the same in the ordinary and usual course of business, not making any discrimination between persons desiring to avail themselves of warehouse facilities—such grain, in all cases, to be inspected and graded by a duly authorized inspector, and to be stored with grain of a similar grade, received at the same time, as near as may be. In no case shall grain of different grades be mixed together while in store; but, if the owner or consignee so requests, and the warehouseman consent thereto, his grain of the same grade may be kept in a bin by itself, apart from that

of other owners; which bin shall, thereupon, be marked and known as a "separate bin." If a warehouse receipt be issued for grain so kept separate, it shall state, on its face, that it is in a separate bin, and shall state the number of such bin; and no grain shall be delivered from such warehouses unless it be inspected on the delivery thereof by a duly authorized inspector of grain. Nothing in this section shall be so construed as to require the receipt of grain into any warehouse in which there is not sufficient room to accommodate or store it properly, or in cases where such warehouse is necessarily closed.

§ 7. Upon application of the owner or consignee of grain stored in a public warehouse of class A, the same being accompanied with evidence that all transporation or other charges which may be a lien upon such grain, including charges for inspection, have been paid, the warehouseman shall issue to the person entitled thereto, a warehouse receipt therefor, subject to the order of the owner or consignee, which receipt shall bear date corresponding with the receipt of grain into store, and shall state upon its face the quantity and inspected grade of the grain, and that the grain mentioned in it has been received into store, to be stored with grain of the same grade by inspection, received at about the date of the receipt, and that it is deliverable upon the return of the receipt, properly indorsed by the person to whose order it was issued, and the payment of proper charges for storage. All warehouse receipts for grain, issued from the same warehouse, shall be consecutively numbered; and no two receipts, bearing the same number, shall be issued from the same warehouse during any one year, except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face "duplicate." If the grain was received from railroad cars, the number of each car shall be stated upon the receipt, with the amount it contained; if from canal boat or other vessel, the name of such craft; if from teams or by other means, the manner of its receipt shall be stated on its face.

§ 8. Upon the delivery of grain from store, upon any receipt, such receipt shall be plainly marked across its face with the

word "canceled," with the name of the person canceling the same, and shall thereafter be void, and shall not again be put in circulation; nor shall grain be delivered twice upon the same receipt.

§ 9. No warehouse receipt shall be issued, except upon the actual delivery of grain into store, in the warehouse from which it purports to be issued, and which is to be represented by the receipt; nor shall any receipt be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received; nor shall more than one receipt be issued for the same lot of grain, except in cases where receipts for a part of a lot are desired, and then the aggregate receipts for a particular lot shall cover that lot and no more. In cases where a part of the grain represented by the receipt is delivered out of store and the remainder is left, a new receipt may be issued for such remainder; but such new receipt shall bear the same date as the original, and shall state on its face that it is balance of receipt of the original number; and the receipt upon which a part has been delivered shall be canceled in the same manner as if it had all been delivered. In case it be desirable to divide one receipt into two or more, or in case it be desirable to consolidate two or more receipts into one, and the warehouseman consent thereto, the original receipt shall be canceled the same as if the grain had been delivered from store; and the new receipts shall express on their face that they are parts of other receipts, or a consolidation of other receipts, as the case may be; and the numbers of the original receipts shall also appear upon the new ones issued, as explanatory of the change, but no consolidation of receipts of dates differing more than ten days shall be permitted, and all new receipts issued for old ones canceled, as herein provided, shall bear the same dates as those originally issued, as near as may be.

§ 10. No warehouseman in this State shall insert in any receipt issued by him, any language in anywise limiting or modifying his liabilities or responsibility, as imposed by the laws of this State.

§ 11. On the return of any warehouse receipt issued by him, properly indorsed, and the tender of all proper charges upon

the property represented by it, such property shall be immediately deliverable to the holder of such receipt, and it shall not be subject to any further charges for storage, after demand for such delivery shall have been made. Unless the property represented by such receipt shall be delivered within two business hours after such demand shall have been made, the warehouseman in default shall be liable to the owner of such receipt for damages for such default, in the sum of one cent per bushel, and in addition thereto, one cent per bushel for each and every day of such neglect or refusal to deliver: *Provided*, no warehouseman shall be held to be in default in delivering if the property is delivered in the order demanded, and as rapidly as due diligence, care and prudence will justify.

§ 12. The warehouseman of every public warehouse of class A shall, on or before Tuesday morning of each week, cause to be made out, and shall keep posted up in the business office of his warehouse, in a conspicuous place, a statement of the amount of each kind and grade of grain in store in his warehouse at the close of business on the previous Saturday; and shall, also, on each Tuesday morning, render a similar statement, made under oath before some officer authorized by law to administer oaths, by one of the principal owners or operators thereof, or by the bookkeeper thereof, having personal knowledge of the facts, to the warehouse registrar appointed as hereinafter provided. They shall also be required to furnish daily, to the said registrar, a correct statement of the amount of each kind and grade of grain received in store in such warehouse on the previous day; also the amount of each kind and grade of grain delivered or shipped by such warehouseman during the previous day, and what warehouse receipts have been canceled, upon which the grain has been delivered on such day, giving the number of of each receipt, and amount, kind and grade of grain received and shipped upon each; also, how much grain, if any, was so delivered or shipped, and the kind and grade of it, for which warehouse receipts had not been issued, and when and how such unreceipted grain was received by them; the aggregate of such reported cancellations and delivery of unreceipted grain, corresponding in amount, kind and grade with the amount so

reported, delivered or shipped. They shall also, at the same time, report what receipts, if any, have been canceled and new ones issued in their stead, as herein provided for. And the warehouseman making such statements, shall, in addition, furnish the said registrar any further information, regarding receipts issued or canceled, that may be necessary to enable him to keep a full and correct record of all receipts issued and canceled, and of grain received and delivered.

§ 13. The grade of grain shall be as follows:

No. 1 white winter wheat shall be pure white winter wheat, sound, plump and well cleaned. No. 2 white winter wheat shall be pure white winter wheat, sound and reasonably clean. No. 1 red winter wheat shall be pure winter wheat, red or red and white mixed, sound, plump and well cleaned. No. 2 red winter wheat shall be pure winter wheat, red or red and white mixed, sound and reasonably clean. Amber, Nos. 1 and 2, shall include the lighter colored varieties of red wheat, quality and condition to be equal to the present standard of Nos. 1 and 2 red winter wheat. No. 3 winter wheat shall include winter wheat not clean and plump enough for No. 2, and weighing not less than fifty-five pounds. Rejected winter wheat shall include winter wheat, damp, musty, or from any cause so badly damaged as to render it unfit for No. 3.

No. 1 spring wheat shall be plump and well cleaned. No. 2 spring wheat shall be sound, reasonably clean, and weighing not less than fifty-six pounds to the measured bushel. Hard spring wheat Nos. 1 and 2 shall include the hard varieties of spring wheat; quality and condition to be equal to the present standard of Nos. 1 and 2 spring wheat. No. 3 spring wheat shall be reasonably clean, not good enough for No. 2, weighing not less than fifty-four pounds. All spring wheat, damp, musty, grown, badly bleached, or, from any other cause, unfit for No. 3, shall be graded as rejected. In case of mixture of spring and winter wheat, it shall be called spring wheat, and graded according to the quality thereof. Black sea and flinty fife wheat in no case shall be inspected higher than No. 2, and rice wheat no higher than rejected.

White corn shall be white, and in all other respects No 1 corn.

Yellow corn shall be yellow, and in all other respects be No. 1 corn. No. 1 corn shall be sound, dry, plump and well cleaned, white and [or] yellow. No. 2 corn shall be dry, reasonably clean, but not plump enough for No. 1. All damp, dirty, or otherwise badly damaged corn shall be graded as rejected. No. 2 kiln-dried corn shall be sound, plump, and well cleaned white or yellow corn. All kiln-dried corn not good enough for No. 2 kiln-dried, shall be graded as rejected kiln-dried corn.

No. 1 oats shall be white, sound, clean and reasonably free from other grain. No. 2 oats shall be sound, reasonably clean, and reasonably free from other grain. Rejected oats shall include such as are damp, unsound, dirty, or from any cause unfit for No. 2.

No. 1 rye shall be sound, plump, and well cleaned. No. 2 rye shall be sound, reasonably clean, and reasonably free from other grain. All rye which is damp, musty, dirty, or which is from any other cause unfit from No. 2 rye, shall be graded as rejected.

No. 1 barley shall be plump, bright, sound, clean, and free from other grain. No. 2 barley shall be reasonably clean and sound, but not bright or plump enough for No. 1, and reasonably free from other grain. No. 3 barley shall include shrunken or otherwise slightly damaged barley, not weighing less than forty-two pounds to the measured bushel. All barley which is damp, musty, or from any cause is badly damaged, or largely mixed with other grain, shall be graded as rejected.

All grain that is warm, or is in a heating condition, shall not be graded. In the inspection of grain, the weight shall not alone determine the grade. All inspectors shall make their reasons for grading grain, when necessary, fully known, by notations on their books. All wheat shall be weighed, and the weight entered on the inspection book.

§ 14. It shall be the duty of the governor to appoint, by and with the advice and consent of the senate, a suitable person, who shall not be a member of the board of trade, and who shall not be interested, either directly or indirectly, in any warehouse in this State, a chief inspector of grain, who shall hold his office for the term of two years, unless sooner removed, as here-

inafter provided, for every city in which is located a warehouse of class A. It shall be the duty of such chief inspector of grain to have a general supervision of the inspection of grain, as required by this act or the laws of this State, under the advice and immediate direction of the board of commissioners of railroads and warehouses. The said chief inspector shall be authorized to nominate to the commissioners of railroads and warehouses, such suitable persons, in sufficient numbers, as may be deemed qualified for assistant inspectors, who shall not be members of the board of trade, nor interested in any warehouse, and, also, such other employees as may be necessary to properly conduct the business of his office; and the said commissioners are authorized to make such appointments. The chief inspector shall, upon entering upon the duties of his office, be required to take an oath as in other cases of officers, and he shall execute a bond to the People of the State of Illinois, in the penal sum of fifty thousand dollars, with sureties to be approved by the board of commissioners of railroads and warehouses, with a condition therein, that he will faithfully and strictly discharge the duties of his said office of inspector according to law, and the rules and regulations prescribing his duties; and that he will pay all damages to any person or persons who may be injured by reason of his neglect, refusal or failure to comply with law, and the rules and regulations aforesaid. And each assistant inspector shall take a like oath, execute a bond in the penal sum of five thousand dollars, with like conditions, and to be approved in like manner as is provided in case of the chief inspector, which said several bonds shall be filed in the office of said commissioners; and suit may be brought upon said bond or bonds in any court having jurisdiction thereof, in the county where the plaintiff or defendant resides, for the use of [the] person or persons injured. The chief inspector of grain, and all assistant inspectors of grain, and other employees in connection therewith, shall be governed in their respective duties by such rules and regulations as may be prescribed by the board of commissioners of railroads and warehouses; and the said board of commissioners shall have full power to make all proper rules and regulations from [for] the inspection of grain; and shall, also,

have power to fix the rate of charges for the inspection of grain, and the manner in which the same shall be collected; which charges shall be regulated in such a manner as will, in the judgment of the commissioners, produce sufficient revenue to meet the necessary expenses of the service of inspection, and no more. It shall be the duty of the said board of commissioners to fix the amount of compensation to be paid to the chief inspector, assistant inspectors, and all other persons employed in the inspection service, and prescribe the time and manner of their payment. The said board of commissioners of railroads and warehouses are hereby authorized to appoint a suitable person as warehouse registrar, and such assistants as may be deemed necessary to perform the duties imposed upon such registrar by the provisions of this act. The said board of commissioners shall have and exercise a general supervision and control of such appointees; shall prescribe their respective duties; shall fix the amount of their compensation, and the time and manner of its payment. Upon the complaint, in writing, of any person, to the said board of commissioners, supported by reasonable and satisfactory proof, that any person appointed or employed under the provisions of this section has violated any of the rules prescribed for his government, has been guilty of any improper official act, or has been found inefficient or incompetent for the duties of his position, such person shall be immediately removed from his office or employment by the same authority that appointed him; and his place shall be filled, if necessary, by a new appointment, or in case it shall be deemed necessary to reduce the number of persons so appointed or employed, their term of service shall cease under the orders of the same authority by which they were appointed or employed. All necessary expenses incident to the inspection of grain, and to the office of registrar, economically administered, including the rent of suitable offices, shall be deemed expenses of the inspection service, and shall be included in the estimate of expenses of such inspection service, and shall be paid from the funds collected for the same.

§ 15. Every warehouseman of public warehouses of class A shall be required, during the first week in January of each year,

to publish in one or more of the newspapers (daily, if there be such) published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in his warehouse during the ensuing year, which rates shall not be increased (except as provided for in § 16 of this act,) during the year; and such published rates, or any published reduction of them, shall apply to all grain received into such warehouse from any person or source, and no discrimination shall be made, directly or indirectly, for or against any charges made by such warehouseman for the storage of grain. The maximum charge for storage and handling of grain, including the cost of receiving and delivering, shall be, for the first thirty days, or part thereof, two cents per bushel, and for each fifteen days, or part thereof, after the first thirty days, one-half of one cent per bushel: *Provided, however*, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days, or part thereof, not exceeding one-half of one cent per bushel.

§ 16. No public warehouseman shall be held responsible for any loss or damage to property by fire, while in his custody, provided reasonable care and vigilance be exercised to protect and preserve the same; nor shall he be held liable for damages to grain by heating, if it can be shown that he has exercised proper care in handling and storing the same, and that such heating or damage was the result of causes beyond his control; and, in order that no injustice may result to the holder of grain in any public warehouse of classes A or B, it shall be deemed the duty of such warehouseman to dispose of by delivery or shipping, in the ordinary and legal manner of so delivering, that grain of any particular grade which was first received by them, or which has been for the longest time in store in his warehouse; and, unless public notice has been given that some portion of the grain in his warehouse is out of condition or becoming so, such warehouseman shall deliver grain of quality equal to that received by him, on all receipts as presented. In case, however, any warehouseman of classes A or B shall discover that any portion of the grain in his warehouse

is out of condition or becoming so, and it is not in his power to preserve the same, he shall immediately give public notice, by advertisement in a daily newspaper in the city in which such warehouse is situated, and by posting a notice in the most public place (for such a purpose) in such city, of its actual condition, as near as he can ascertain it; shall state in such notice the kind and grade of the grain, and the bins in which it is stored; and shall also state in such notice the receipts outstanding upon which such grain will be delivered, giving the numbers, amounts and dates of each; which receipts shall be those of the oldest dates then in circulation or uncanceled, the grain represented by which has not previously been declared or receipted for as out of condition; or if the grain longest in store has not been receipted for, he shall so state, and shall give the name of the party for whom such grain was stored, the date it was received, and the amount of it; and the enumeration of receipts and identification of grain so discredited, shall embrace, as near as may be, as great a quantity of grain as is contained in such bins, and such grain shall be delivered upon the return and cancellation of the receipts, and the unreceipted grain upon the request of the owner or person in charge thereof. Nothing herein contained shall be held to relieve the said warehouseman from exercising proper care and vigilance in preserving such grain after such publication of its condition; but such grain shall be kept separate and apart from all direct contact with other grain, and shall not be mixed with other grain while in store in such warehouse. Any warehouseman guilty of any act or neglect, the effect of which is to depreciate property stored in the warehouse under his control, shall be held responsible as at common law, or upon the bond of such warehouseman, and, in addition thereto, the license of such warehouseman, if his warehouse be of class A, shall be revoked. Nothing in this section shall be so construed as to permit any warehouseman to deliver any grain stored in a special bin, or by itself, as provided in this act, to any but the owner of the lot, whether the same be represented by a warehouse receipt or otherwise. In case the grain declared out of condition, as herein provided for, shall [not] be removed from store by the owner thereof, within two months from the date of

the notice of its being out of condition, it shall be lawful for the warehouseman where the grain is stored, to sell the same at public auction, for account of said owner, by giving ten days' public notice by advertisement in a newspaper (daily, if there be such) published in the city or town where such warehouse is located.

§ 17. It shall not be lawful for any public warehouseman to mix any grain of different grades together, or to select different qualities of the same grade for the purpose of storing or delivering the same, nor shall he attempt to deliver grain of one grade for another, or in any way tamper with grain while in his possession or custody, with a view of securing any profit to himself or any other person; and in no case, even of grain stored in a separate bin, shall he be permitted to mix grain of different grades together while in store. He may, however, on request of the owner of any grain stored in a private bin, be permitted to dry, clean, or otherwise improve the condition or value of any such lot of grain, but in such case it shall only be delivered as such separate lot, or as the grade it was originally [inspected] when received by him, without reference to the grade it may be as improved by such process of drying or cleaning. Nothing in this section, however, shall prevent any warehouseman from moving grain while within his warehouse, for its preservation or safe keeping.

§ 18. All persons owning property, or who may be interested in the same, in any public warehouse, and all duly authorized inspectors of such property, shall at all times, during ordinary business hours, be at full liberty to examine any and all property stored in any public warehouse in this state, and all proper facilities shall be extended to such person by the warehouseman, his agents and servants, for an examination; and all parts of public warehouses shall be free for the inspection and examination of any person interested in property stored therein, or of any authorized inspector of such property. And all scales used for the weighing of property in public warehouses shall be subject to examination and test by any duly authorized inspector or sealer of weights and measures, at any time when required by any person or persons, agent or agents, whose prop-

erty has been or is to be weighed on such scales; the expense of such test by an inspector or sealer to be paid by the warehouse proprietor if the scales are found incorrect, but not otherwise. Any warehouseman who may be guilty of continuing to use scales found to be in an imperfect or incorrect condition by such examination and test, until the same shall have been pronounced correct and properly sealed, shall be liable to be proceeded against as hereinafter provided.

§ 19. In all places where there are legally apppointed inspectors of grain, no proprietor or manager of a public warehouse of class B shall be permitted to receive any grain and mix the same with the grain of other owners, in the storage thereof, until the same shall have been inspected and graded by such inspector.

§ 20. Any person who shall assume to act as an inspector of grain, who has not first been so appointed and sworn, shall be held to be an impostor, and shall be punished by a fine of not less than $50, nor more than $100, for each and every attempt to so inspect grain, to be recovered before a justice of the peace. Any duly authorized inspector of grain who shall be guilty of neglect of duty, or who shall knowingly or carelessly inspect or grade any grain improperly, or who shall accept any money or other consideration, directly or indirectly, for any neglect of duty, or the improper performance of any duty as such inspector of grain, and any person who shall improperly influence any inspector of grain in the performance of his duties as such inspector, shall be deemed guilty of a misdemeanor, and, on conviction, shall be find in a sum not less than $100, nor more than $1,000, in the discretion of the court, or shall be imprisoned in the county jail not less than three nor more than twelve months, or both, in the discretion of the court.

§ 21. In case any owner or consignee of grain shall be dissatisfied with the inspection of any lot of grain, or shall, from any cause, desire to receive his property without its passing into store, he shall be at liberty to have the same withheld from going into any public warehouse (whether the property may have previously been consigned to such warehouse or not), by giving notice to the person or corporation in whose

possession it may be at the time of giving such notice; and such grain shall be withheld from going into store, and be delivered to him, subject only to such proper charges as may be a lien upon it prior to such notice. The grain, if in railroad cars, to be removed therefrom by such owner or consignee within twenty-four hours after such notice has been given to the railroad company having it in possession: *Provided*, such railroad company place the same in a proper and convenient place for unloading; and any person or corporation refusing to allow such owner or consignee to so receive his grain shall be deemed guilty of conversion, and shall be liable to pay such owner or consignee double the value of the property so converted. Notice that such grain is not to be delivered into store may also be given to the proprietor or manager of any warehouse into which it would otherwise have been delivered, and if, after such notice, it be taken into store in such warehouse, the proprietor or manager of such warehouse shall be liable to the owner of such grain for double its market value.

§ 22. It shall be unlawful for any proprietor, lessee or manager of any public warehouse, to enter into any contract, agreement, understanding, or combination, with any railroad company, or other corporation, or with any individual or individuals, by which the property of any person is to be delivered to any public warehouse for storage, or for any other purpose, contrary to the direction of the owner, his agent, or consignee. Any violation of this section shall subject the offender to be proceeded against as provided in § 23 of this act.

§ 23. If any warehouseman of class A shall be guilty of a violation of any of the provisions of this act, it shall be lawful for any person injured by such violation to bring suit in any court of competent jurisdiction, upon the bond of such warehouseman, in the name of the people of the state of Illinois, to the use of such person. In all criminal prosecutions against a warehouseman, for the violation of any of the provisions of this act, it shall be the duty of the prosecuting attorney of the county in which such prosecution is brought, to prosecute the same to a final issue, in the name of and on behalf of the people of the state of Illinois.

§ 24. Warehouse receipts for property stored in any class of public warehouses, as herein described, shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another. All warehouse receipts for property stored in public warehouses of class C shall distinctly state on their face the brand or distinguishing marks upon such property.

§ 25. Any warehouseman of any public warehouse who shall be guilty of issuing any warehouse receipt for any property not actually in store at the time of issuing such receipt, or who shall be guilty of issuing any warehouse receipt in any respect fraudulent in its character, either as to its date or the quantity, quality, or inspected grade of such property, or who shall remove any property from store—except to preserve it from fire or other sudden danger—without the return and cancellation of any and all outstanding receipts that may have been issued to represent such property, shall, when convicted thereof, be deemed guilty of a crime, and shall suffer, in addition to any other penalties prescribed by this act, imprisonment in the penitentiary for not less than one, and not more than ten years.

§ 26. Nothing in this act shall deprive any person of any common law remedy now existing.

§ 27. All proprietors or managers of public warehouses shall keep posted up at all times, in a conspicuous place in their business offices, and in each of their warehouses, a printed copy of this act.

§ 28. All acts or parts of acts inconsistent with this act are hereby repealed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1874.

IRA Y. MUNN AND GEORGE L. SCOTT, *Plaintiffs in Error.*

—*vs.*—

THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error.*

ERROR TO SUPREME COURT OF ILLINOIS.

ARGUMENT FOR DEFENDANTS IN ERROR.

JAMES K. EDSALL, Attorney General.

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STATEMENT OF THE CASE.

The Constitution of Illinois, adopted in 1870, contains the following in reference to the inspection of grain and the storage thereof in public warehouses:

"ARTICLE XIII.

WAREHOUSES.

SECTION 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

§ 2. The owner, lessee or manager of each and every public warehouse situated in any town or city of not less than 100,000 inhabitants, shall make weekly statements under oath before some officer designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots shall not be mixed with inferior or superior grades without the consent of the owner or consignor thereof.

§ 3. The owners of property stored in any warehouse or holder of a receipt for the same, shall always be at liberty to examine

such property stored, and all the books and records of the warehouse in regard to such property.

§ 4. All railroad companies and other common carriers on railroads shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof, at the place of destination.

§ 5. All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee, or the elevator, or public warehouse, can be reached by any track owned, leased or used, or which can be used, by such railroad company; and all railroad companies shall permit connections to be made with their tracks, so that any such consignee, and any public warehouse, coal bank or coal yard may be reached by the cars on said railroad.

§ 6. It shall be the duty of the General Assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the Constitution, which shall be liberally construed, so as to protect producers and shippers. And the enumeration of the remedies herein named shall not be construed to deny to the General Assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common-law remedies.

§ 7. The General Assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce."

The provisions of the act of the General Assembly of Illinois, entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article thirteen of the Constitution of this State," approved April 25, 1871, so far as the same have any direct bearing upon the present inquiry, are as follows:

"§ 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That public warehouses, as defined in Article thirteen of the Constitution of this State, shall be divided into three classes, to be designated as classes A, B and C, respectively."

"§ 2. Public warehouses of class A shall embrace all warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators or granaries, being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration."

"§ 3. The proprietor, lessee or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the Circuit Court of the county a license, permitting such proprietor, lessee or manager, to transact business as a public warehouseman under the laws of this State, which license shall be issued by the clerk of said court upon a written application, which shall set forth the location and name of such warehouse and the individual name of each person interested as owner or principal in the management of the same, or, if the warehouse be owned or managed by a corporation, the names of the president, secretary, and treasurer of such corporation shall be stated; and the license shall give authority to carry on and conduct the business of a public warehouse of class A in accordance with the laws of this State, and shall be revokable by the said court upon a summary proceeding before the court, upon complaint of any person in writing setting forth the particular

violation of law, and upon satisfactory proof to be taken in such manner as may be directed by the court."

"§ 4. The person receiving a license as herein provided, shall file with the clerk of the court granting the same, a bond to the People of the State of Illinois, with good and sufficient surety, to be approved by said court, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman of class A and the full and unreserved compliance with all laws of this State in relation thereto."

"§ 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein provided, or who shall continue to transact any such business after such license has been revoked (save only that he may be permitted to deliver property previously stored in such warehouse) shall on conviction be fined in a sum not less than one hundred dollars for each and every day such business is so carried on; and the court may refuse to renew any license, or grant a new one to any of the persons whose license has been revoked, within one year from the time the same was revoked."

"§ 15. Every warehouseman of public warehouses of class A, shall be required during the first week of January of each year, to publish in one or more of the newspapers (daily, if there be such) published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in the warehouse during the ensuing year, which rates shall not be increased, (except as provided for in section sixteen of this Act) during the year; and such published rates or any published reduction of them shall apply to all grain received into such warehouse from any person or source, and no discrimination shall be made directly or indirectly, for or against any charges made by such warehouseman for the storage of grain.

"The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first

thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per pushel storage for the first ten days, and for each additional five days or part thereof not exceeding one-half of one per cent per bushel."

Other sections of the Act make provision for the inspection of grain by public officers, and the storage thereof in public warehouses. The sections here quoted are but parts of the general system of the laws of the State regulating such inspection and storage. Rev. Stat. of Ill. (of 1874) pp. 820-827.

While this Act was in force the State's Attorney of Cook county, Illinois, filed an information in the Criminal Court of that county, in the name of The People of the State of Illinois against the plaintiffs in error, charging them with a violation of the Act above cited, in this:

"That said Ira Y. Munn and George L Scott, on the 28th day of June, 1872, at and within the city of Chicago, in said county of Cook, and State of Illinois aforesaid, were the *managers* of a certain public warehouse located in said city of Chicago, known as 'The Northwestern Elevator,' and that the said Ira Y. Munn and George L. Scott did then and there store grain in bulk in said warehouse, and did then and there mix the grain of different owners together, in said warehouse and that the said city of Chicago did then and there contain more than one hundred thousand inhabitants; and that they, the said Ira Y. Munn and George L. Scott, did then and there unlawfully transact the business of public warehousemen in the said warehouse, in the manner and form aforesaid; and that they, the said Ira Y. Munn and George L. Scott, did not procure a license from the Circuit Court of said county permitting them to transact business as public warehousemen in said warehouse in manner and form as afore-

said, under the laws of the State of Illinois, before transacting the business of public warehousemen, contrary to the statute, and against the peace and dignity of the said people of the said State of Illinois.

The second count of the information charges that the defendants below carried on such business as *lessees* of the same warehouse without having procured a license therefor, and in other respects is substantially the same as the first count.

The cause was submitted to the court below upon an agreed statement of facts, as follows:

"It is agreed for the purpose of this trial that the respondents leased the premises in the city of Chicago, Cook county, Illinois, whereon 'The Northwestern Elevator' stands, of the owner, in the year A. D. 1862, and that respondents in that year, with their own capital and means, erected thereon the grain warehouse or elevator described in the information in this proceeding as the 'Northwestern Elevator,' and that they have, ever since that date, carried on in said elevator, and by means thereof, the business of receiving, storing and handling grain for hire, for which they have charged and received as a compensation such rates of storage as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January of each year, as the established rates for the year then next ensuing such publication.

"And for the purposes of this trial it is further agreed that at the time stated in the information, to-wit: the 28th day of June, A. D. 1872, the respondents were the managers and proprietors of the grain warehouse known and described in the information in this proceeding as the 'Northwestern Elevator, situate in the city of Chicago, county of Cook, and State of Illinois, wherein grain was stored in bulk, and in which the grain of different own-

ers was mixed together by said managers, and that the said respondents were then and there in and by means of said elevator carrying on the business of receiving, storing and delivering grain for hire, without having taken out a license from the Circuit Court of Cook county aforesaid, permitting them as such managers, to transact business as public warehousemen under the laws of the State, and without having filed with the clerk of the Circuit Court of Cook county a bond to the People of the State of Illinois, as is prescribed and required by the third (3d) and fourth (4th) sections of an act of the legislature of this State, entitled 'An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article XIII of the Constitution of the State," approved April 25, A. D. 1871.

"And it is further admitted that the city of Chicago did, on the 28th day of June, A. D. 1872, and for more than two years prior thereto, have more than 100,000 inhabitants."

It was also stipulated that the respondents stored grain with the consent of the owners or consignees; that during the first week in January, 1872, respondents, together with other warehousemen in Chicago, published a notice containing a schedule of rates they would charge for storage, which is given at length in the stipulation.

That since the publication of such rates the respondent received the rates of storage set out in said advertisement; that they complied with the Constitution and act in question except in these two particulars, viz: that respondents had never taken out any license or given any bond as required by sections three (3) and four (4) of said act, and that the rates of storage so published and received were higher rates of storage than the maximum rates specified in section 15 of said act.

The stipulation then proceeds as follows:

"It is hereby stipulated and agreed for and on behalf of the people, that the foregoing statement of facts is true, but that the

same is immaterial and irrelevant, and ought not to be considered by the court except as to so much thereof as sets forth and admits as follows, to-wit:

1. That the city of Chicago had a population of one hundred thousand inhabitants.

2. That the respondents were the proprietors and managers of the "Northwestern Elevator," the same being a grain warehouse in which grain was stored in bulk, and the grain of different owners was mixed together, and situate in said city of Chicago.

3. That the respondents transacted the business of warehousemen in said warehouse, and stored grain in bulk and mixed the grain of different owners together, without first taking out a license from the Circuit Court of Cook county permitting them to transact the business of public warehousemen in said warehouse under the laws of this State, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as provided by the 3d and 4th sections of an act in said statement referred to.

"It is further agreed for the purposes of this trial that the foregoing statement of facts, shall be received and considered by the court, with like legal effect as if the same were given in evidence by witnesses or other competent legal evidence, so far as the court shall deem the same admissible, and competent to be considered on the trial of this cause, and that thereupon after argument by counsel for the people and said respondents (if either party should desire to argue the same) such judgment shall be rendered by the court as it shall deem proper and warranted by the law and the evidence in the cause, saving and reserving to both parties all rights and advantage of exception to such decision of the court, the same as if a trial by jury or before the court had been had, and such exception and advantage had been taken and saved by means of timely and proper bills of exception thereto."

The court found the defendants, guilty and imposed a fine of $100, besides the payment of costs.

From this judgment of the Criminal Court the defendants therein prosecuted a writ of error to the Supreme Court of the State, where the judgment of the court below was affirmed. The plaintiffs in error having petitioned the Supreme Court for a re-hearing, such petition was denied at the September Term, A. D. 1874, of that Court. From thence they prosecuted a writ of error to this Court and make the following:

"ASSIGNMENT OF ERRORS.

"The Plaintiffs in Error say that the Supreme Court of Illinois committed error to their injury and prejudice in affirming the judgment of the Criminal Court of Cook county against them in this:—

"1. Sections three, four, five and fifteen of the Statute passed by the Legislature of Illinois, entitled "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article XIII of the Constitution of this State," approved April 25, 1871, under which the plaintiffs in error were convicted and fined, were unconstitutional and void.

"2. Said sections are repugnant to the third clause of section eight of Article I of the Constitution of the United States; and also to Article V of the Amendments to the Constitution; and also to the first section of Article XIV of the Amendments.

"3. The Supreme Court of Illinois decided erroneously said sections to be valid, and not repugnant to the Constitution of the United States, and erroneously affirmed the judgment of the Criminal Court of Cook County."

ARGUMENT FOR THE DEFENDANTS IN ERROR.

We shall consume no time in an effort to impress upon the Court a conviction of the great importance of the principles involved in this case. The mere fact that this Court is asked to adjudge, not only that a State statute, but that the provisions of a State Constitution are repugnant to the Federal Constitution, and therefore void, is sufficient to arrest the attention of the Court, and to secure its most careful consideration.

The first general proposition of the counsel for the plaintiffs in error is that the sections of the Illinois statute, before cited, are repugnant to the third clause of section 8, Article I, of the Constitution of the United States, which confers upon the Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

We shall insist:

I.

THE REGULATION OF THE INSPECTION AND STORAGE OF GRAIN IN PUBLIC WAREHOUSES AS CONTEMPLATED BY THE ACT IN QUESTION, IS NOT A REGULATION OF COMMERCE WITH FOREIGN NATIONS, NOR AMONG THE SEVERAL STATES, WITHIN THE PURVIEW OF THE FEDERAL CONSTITUTION.

A clear apprehension of the relations existing between the storage of grain in public warehouses in Chicago and our interstate commerce, is essential to an intelligent discussion of the legal questions arising upon this record.

We agree with the counsel for plaintiffs in error, that the Court will take notice, without proof, of the course of trade, and the general commercial usages of the country and the world, including

the manner in which the business of transportation and commerce is conducted. The same counsel also cites with approbation the language of the Supreme Court of Illinois in *Vincent* v. *C. & A. R. R. Co.*, 49 Ill., 38, where it is said :

"There are some facts connected with the vast internal commerce of this State, of which, independent of any averments in the bill, we will take judicial notice. The immense quantities of grain which are annually transported to Chicago over our lines of railways, making that city, with the aid of contributions from neighboring States, one of the great grain markets of the world, are chiefly sent in bulk. The grain is ordinarily consigned to commission merchants who have erected vast warehouses, termed elevators, connected by side tracts with the main line of some railway, and provided with machinery for the rapid unloading of the cars and storage of the grain. As the grain is of various grades and prices it is of great importance to the agricultural and mercantile interests of the State, that each shipment of grain should be stored by itself, or with grain of the same grade, and that every shipper should be able to select his own consignee, with the certainty that, if his elevator is on the line of the road by which the grain is transported, and the consignee is ready to receive the shipment, it shall be faithfully delivered to him."

In all this we fully concur; and we may add, that where a cause is brought before this Court, for review on writ of error to a State Court, the Supreme Court of the United States must of necessity take judicial knowledge of all such matters as the State Court is bound thus to know. The Court will undoubtedly take judicial notice of the ordinary mode of transacting business in matters of such magnitude as the grain trade of Chicago.

The Court will then take judicial notice of such facts as show the true relation of the storage and warehousing of grain in Chicago to the "commerce among the sveeral States," in the ordinary course of business. It will thus appear that in the

ordinary course of business, the grain which is shipped from places in the interior of Illinois to markets beyond the limits of that State, or which is shipped from States north and west of Illinois through that State to eastern or southern markets, does not stop by the way for storage in the Chicago elevators or warehouses. Such grain as is received and stored in the elevators or warehoses in Chicago is not grain *in transitu* through that city from a point, either within or without the State of Illinois to some place or market beyond its limits. On the contrary it is grain which has arrived at its destination. It has reached its consignee, who, for purposes of his own convenience, has it stored in these warehouses instead of taking it into personal custody and providing a place for its storage and safe-keeping. When the railway company delivers a train of cars laden with grain at a warehouse, the functions and liabilities of the common carrier both terminate. It is not delivered to the warehouseman as forwarding merchants, to be re-shipped, or sent forward to some remote consignee. It has for the time ceased to be the subject of inter-State commerce. It has reached the market where its owner desires it to be offered for sale, or to be placed in store for future sale. The grain is inspected by public officers, under authority of law. Rev. Statutes of Ill. of 1874, p. 823, § 108.

It is the duty of those following the vocation of common or public warehousemen, to receive the grain, store it in bulk with grain of the same grade, and issue to the owner or consignee a "warehouse receipt" therefor. *Ibid.* p. 821.

The particular grain thus stored has become confused in the general mass—its identity can no longer be traced; and the warehouse receipt issued therefor, is merely evidence of title to a like quantity of similar grain of the same grade. These receipts are, under the statute, negotiable by endorsement, which constitutes a valid transfer of the legal title to the grain represented thereby. (*Ibid.* p. 827, § 118.)

The grain remains in store a greater or less length of time, at the pleasure of its owner—not unfrequently from September until the following May. While thus in store, the grain is the subject of purchase and sale by those dealing in such commodities. A part is sold to millers of Illinois, who convert the same into flour, either for home consumption or for shipment to markets in other places. The greater portion is probably sold to those who finally ship the same to other States or foreign countries.

It is a mistaken assumption that the grain transported through the State of Illinois, or even through the city of Chicago, in the course of one continuous shipment, to points outside of the State, is ever received for storage in the warehouses in Chicago.

It appears from the Report of the U. S. Commissioner of Agriculture for 1873, that the total number of bushels of corn, wheat, rye, oats and barley produced in Illinois, in that year, was two hundred and seven millions seven hundred and sixty-nine thousand, (207,769,000.)

Report of U. S. Dept. of Agricult. for 1873, p. 23.

The official Report of the Warehouse Registrar at Chicago, made to the Board of Railroad and Warehouse Commissioners of Illinois, shows that the total number of bushels of the same kinds of grain which were received in the public warehouses of that city during the year ending Nov. 1, 1873, was sixty-eight millions eighty-five thousand seven hundred and eighty five, (68,085,785.)

Report of R. & W. Com'rs of Ill. for 1873, *p.* 43.

It appears, then, from sources of which the court will take judicial notice, so far as the facts may be material in the consideration of this case, that the entire quantity of grain which is received for storage in Chicago warehouses from the States of Illinois, Iowa, Wisconsin, Minnesota, Nebraska, Kansas and other States, and Territories, referred to in the argument of counsel for Plaintiffs in Error, is less than one-third of the product of Illinois of the same kinds of grain. No one informed upon the subject will

claim that all these great grain growing States do not annually ship to eastern markets either through or past Chicago, many times the amount of grain which is annually stored in Chicago warehouses.

This is accounted for by the fact that the *through* shipments, that is shipments of grain from those States, consigned to markets east of Chicago, do not enter the Chicago elevators or warehouses, although the same may, in their transit, pass through or around that city. In the ordinary course of business, these warehouses only receive such grain as is consigned to Chicago as its market and not such as merely passes through that city on its way to other markets. If the elevators or machinery pertaing to grain warehouses are ever used for the mere purpose of unloading railroad cars and transferring their contents to lake vessels or other means of transportation, it is only in exceptional cases, and the Statute, of Illinois, regulating the storage of such grain and providing the maximum rates therefore, have no application to such use of the machinery of such elevators. The Statute only applies to grain placed in store or "stored in bulk" for which negotiable warehouse receipts are required to be issued by the warehouseman.

Rev. Stat. of Ill. of 1874, pp. 820—823.

The Statute only affects, therefor, grain consigned to the Chicago market, or shipped to that city as its place of destination, and does not assume to regulate the transfer of grain from one means of transportation to another, while it is *in transitu* through the city of Chicago or State of Illinois. *In other words, the Chicago warehouses only receive and store the grain, which, for the time of such storage, is the subject of the domestic or internal commerce of the State, and not that which is passing through or from the State to markets beyond its limits, and is thus the subject of inter-State commerce.*

The transportation of such grain from one State to another is undoubtedly comprehended within, and forms a part of the "commerce among the several States." But such transportation is in nowise affected by the law in question.

This law only has application to such grain as may be shipped to Chicago as its market, and which is there received, retained, bought and sold, and enters into the local commerce of that city, or the internal commerce of the State. It is true the grain may have been the subject of "commerce among the several States" while in course of transportation from some place without the State of Illinois to the city of Chicago. And it may again become the subject of such commerce, if transported to some other State for sale or consumption. But during the interval between its receipt by its consignee in Chicago and delivery to a common carrier for shipment to another State, that is during the period of its storage in public warehouses in that city, its *situs* is there, and it is subject to State laws.

Its *status* and relations in this regard are not unlike that of goods purchased in other States by a wholesale merchant of Chicago for sale to his customers in other States. Such goods have been, and are intended again to become, the subject of inter-state commerce. But while they are kept in store in that city by the Chicago wholesale merchant, they remain subject to State regulation, State taxation and State control.

Woodruff v. *Parham*, 8 Wallace, 136.

In the case last cited, after affirming that such property is subject to taxation under State authority, this Court says:

"If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State, nor the city, which protects his life and property, can make him contribute a dollar to support the

government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens. These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown* v. *Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

The fact that the owner of grain has the same stored in a public warehouse, while the wholesale merchant keeps his goods in his own storehouse, does not affect the question as to whether such goods are the subject of the internal commerce of the State, or of the "commerce among the several States." The fact that goods have once been, or may become, subjects of inter-state commerce, does not permanently, or indellibly, stamp that character upon them. It continues no longer than they are the objects of commercial transfer from one State to another.

When that relation ceases, the liability to Congressional regulation terminates.

Property while in transit from one State to another, or through a State, cannot be taxed by authority of such State.

Case of the State Freight Tax, 15 Wal., 281.

But after it has reached its destination, and is there offered for sale, it is subject to taxation by State authority equally with other similar property there situated.

Woodruff v. *Parham*, 8 Wal., 123, 136.

Hinson v. *Lott*. Ib. 152.

This Court has frequently pointed out distinctions between local transactions and those which form a part of the inter-state commerce. Thus, in *Paul* v. *Virginia*, 8 Wal., 183, it is said:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect, are not executed, until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

The purchase of grain stored in a Chicago warehouse by a citizen of another State would not therefore, constitute commerce between the States. If so, upon what ground can it be held that the storage of grain in public warehouses for the purpose of such sale, constitutes a part of such commerce? As we have already shown such storage is not a mere incident of its transportation from one State to another. It is the storage or preservation of the grain by, or for, its owner, in the market where it is placed and kept for sale. After the grain is transported to its market, it is necessary to store the same during the period it is held for sale; so it is necessary to store the same until the owner sees fit to ship it elsewhere; and without such storage neither the inter-state nor domestic commerce in the grain can be conveniently carried on. It is equally necessary to both the inter-state and domestic commerce, that the fields should be cultivated, and the

crop should be harvested and threshed, or prepared for the market; yet none of these things are a part of the inter-state commerce.

An ordinance of the city of Mobile required that every express company or railroad company doing a business extending beyond the limits of the State, should pay an annual license of $500, which should be deemed a first grade license; that every express or railroad company doing a business within the limits of the State, should take out a license called a second grade license, and pay therefor $100; and that every such company doing business within the city, should take a third grade license, paying therefor $50. And it subjected any person or incorporated company who should violate any of its provisions to a fine not exceeding $50 for each day of such violation.

The validity of this ordinance was assailed upon the ground that it imposed a burden upon inter-state commerce, and was therefore repugnant to the clause of the Constitution which confers upon Congress the power to regulate commerce between the States. This Court overruled that objection, and held the ordinance to be valid; and at the conclusion of the opinion, say:

"The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts within the State for such transportation beyond it. It was with reference to this feature of the business that the tax was in part imposed; but it was no more a tax upon inter-state commerce than a general tax on drayage would be, because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State."

Osborne v. *Mobile*, 16 Wal., 482.

It is not everything which affects commerce which amounts to a regulation of it, within the meaning of the Constitution. *Ibid.*

It is not incumbent upon us to show that the regulation of the storage of grain, in bulk, in public warehouses, in nowise affects

inter-state commerce in such grain. The internal commerce of the respective States, and the commerce between the several States have intimate relations, and in many respects are closely inter-woven, so that one is larely dependent upon the other. Yet the States possess the undoubted power to regulate their domestic commerce.

Nathan v. *Lousiana* 8 Howard 82.

In the exercise of this power, the inter-state commerce must necessarily be more or less influenced, for the same commodities are upon one day, the subject of the domestic commerce of a State, and the next day, or even hour, may become the subject of commerce between the States. In order to determine whether any given law of a State is a regulation of the commerce of such State or of the "commerce among the several States" a fair test would seem to be this: To ascertain whether it assumes to regulate transactions in the article or commodity in question, while it is a part of the general mass of property having its *situs* in such State, and which transactions do not necessarily embrace the transportation of such property from one State to another; or whether the law is brought into active operation, and applies to the property because of its transportation from one State to another, or in other words, on account of its entering into, and becoming the subject of inter-state commerce.

If the former is the scope and purpose of the law, we insist it should be classed among regulations of the domestic, or internal commerce of the State.

If the latter, then we are willing to concede that it would, with propriety, be regarded as a regulation of "commerce among the several States."

These propositions are clearly deducible from the decisions of this court.

Thus, a State cannot tax, or in anywise embarrass or restrain the transportation of goods from one State to another, by those

who chose to engage in inter-state commerce. *Case of the State Freight-Tax.* 15 Wal. 281.

Nor can a State in anywise discriminate against such goods upon the ground that the same are to become, or have been, the subjects of such commerce.

Woodruff v. *Parham.* 8 Wal. 139.

Nevertheless, when the property has reached its consignee, and is become a part of the general mass of property having its *situs* within the State, it may be taxed and subjected to the commercial regulations of the State in like manner, and to the same extent, as other property therein, which had never been the subject of inter-state commerce. *Ibid.*

Hinsin v. *Lott* 8 Wallace 150.

Reference is made in the arguments of Counsel, to the geographical position of the city of Chicago, and to the fact that the grain warehouses of that city are so situated as to be accessible from the system of railroads centering there, and from the Chicago River, which forms the harbor of that port, connecting with the Lakes. The inference is sought to be raised, that because these warehouses are thus situated, and are to a considerable extent used in the receiving and storing of grain transported to them from other States, which is subsequently re-shipped by water or rail to Eastern markets, that the warehouses themselves are so identified with inter-state commerce as to be of necesity free from commercial regulation by State authority, and only subjected to the control of Congress This conclusion we submit does not follow from the premises.

If this argument is sound, much of the most important business carried on in that great city, possesses a like immunity from State control. For example, the Lumberyards of that city are situated at points accessible by both railroad and water communication. They seek these positions, because of the greater facilities thereby offered, for receiving the lumber from the vessels engaged in

inter-state commerce upon the Lakes, and shipping the same to their customers in Illinois and other States. The transportation of lumber from Wisconsin and Michigan, to the Chicago lumberyards, is a part of the inter-state commerce. So is its transportation from thence to other States, for sale; and during such transportation to and from the Chicago lumber yards, it is subject to such commercial regulations as Congress may see fit to impose. But during the period of its storage in the Chicago lumber yards, and the time it is there kept for sale, such lumber sustains another relation, viz: It is subject to such commercial regulations as may be prescribed in the laws of Illinois. Its *status*, in this regard is identical with the wholesale merchant's goods while in his storehouse in Chicago, for sale. The State cannot discriminate against such goods, or such lumber, because of their having been imported from another State; but it may place the same upon terms of equality with similar goods produced within the State, and regulate transactions in the same by equal and undiscriminating laws.

The storage of grain in Chicago for purpose of sale, in warehouses suitably situated and adapted to that purpose, must, as regards this question, stand upon the same basis, as the storage of lumber in Chicago lumber yards for the purpose of sale, or the storage of goods in the warehouses of the wholesale merchants of that city, to await future sales in the regular course of their business.

II

A STATE MAY REGULAT THE INSPECTION AND STORAGE OF GRAIN IN PUBLIC WAREHOUSES AS A BRANCH OF ITS INTERNAL COMMERCE.

In *Gibbons* v. *Ogden*, 9 Wheaton, 203, Chief Justice Marshall discussing the validity of State Inspection laws, says: "The object of inspection laws is to improve the quality of articles pro-

duced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating *the internal commerce of a State*, and those respecting turnpike roads, ferries, etc., are component parts of this mass."

This language is quoted with approbation in the recent opinion of this Court in the *Slaughter House Cases*, 16 Wal., 63.

The power of the States to regulate their internal commerce cannot be seriously questioned. *Ibid.*

People v. *Saratoga and Rens. R. R. Co.*, 15 Wend., 135.

Nathan v. *Louisiana*, 8 Howard, 82.

We have already shown that the inspection laws of Illinois, in their practical operation, only affect such grain as is at the time the subject of the internal commerce of the State.

Grain, which is in the course of transportation from one State to another, or through the State of Illinois, is not deposited in the Chicago warehouses. It is grain consigned to that market for sale, which there finds a resting place. If such grain has ever been transferred from State to State, and was thus the subject of inter-state commerce, its relations in this regard terminate when it has reached the place of its destination, and become a part of the general mass of property there held for sale in the regular course of the commerce there carried on.

We do not understand that the learned counsel for plaintiffs in error deny the power of the State to pass inspection laws, and to regulate the inspection of grain. The existence of this power is unquestionable.

Gibbons v. *Ogden*, 9 Wheaton, 203.

Slaughter House Cases 16 Wal. 63.

Gilman v. *Philadelphia* 3 Wal. 726.

City of New York v. *Miln.* 11 Peters 133.

If the State may regulate the inspection of grain and impose upon the shipper or producer the charges for such inspection, as a condition precedent to his right to have such grain stored in a public warehouse, may not the State at the same time regulate such storage, and protect the shipper or producer against extortionate charges therefor?

The regulation of the storage of grain in public warehouses is a necessary incident of the regulation of its inspection. This will be seen from an examination of the Illinois Statute upon the subject.

Rev. Stat. of Illinois. (of 1874.) pp, 820, 827.

The Court must take judicial notice of the fact, (for such it is) that the great mass of cereal grains produced from the broad fields of the West and Northwest, is chiefly shipped in bulk. To carry out any efficient system of inspection, it is necessary to require, as the Illinois Statute provides, that warehousemen shall not mix different grades of grain, but shall store each grade with other grain of the same kind and quality,

Rev. Stat. of Ill., (of 1874), p. 821, § 101, and p. 825, § 111.

It is necessary not only that the grain should be inspected *into* the warehouses when it is there delivered, but that it should be inspected *out*, when it is sold to be shipped elsewhere. (*Ibid* p. 821, § 101.)

The warehouseman's receipt, issued to the owner of the grain, is required to indicate the grade of the grain, "as inspected." (*Ibid*, § 102.)

This receipt constitutes the evidence of title to the grain, as well as of its grade and quality. The receipts are negotiable by indorsement, and thus constitute the instruments, by the use of which, very extensive commercial transactions are carried on. All

this is based upon the faith and confidence which the business public place in the system of State inspection and regulation of the storage of the grain in the public warehouses.

Unless the State may follow the grain into the warehouse and regulate its storage, it would be useless to inspect each car load or consignment as it is placed in store. It is impracticable to store each car load in a separate bin, and unless the power of the State extends so far as to require each grade of grain to be stored by itself, and generally to regulate such storage, the attempt to regulate the inspection would prove a failure. It could subserve no useful purpose to inspect a car load of wheat and determine its grade and quality, if it may, while stored in market for sale, be confused with a mass of other wheat of a different grade or quality. We submit therefore, that it is but the exercise of the legitimate powers of a State, to regulate the inspection and warehousing or storage of grain, thus placed upon the market for sale within its limits.

If the State of Illinois should undertake to regulate the transportation of grain from State to State, or to impose any obstructions to, or burdens upon, such transportation, a case would arise to which could be applied the arguments of the learned counsel for plaintiffs in error, denying the existence of such power on the part of the State.

But, we submit, no such question arises on this record.

The fact that a part of the grain shipped to Chicago, and stored in the warehouses of that city, has once been, or may again become the subject of inter-State commerce, does not impress that character upon it while it is held for sale in the Chicago market. The law does not discriminate against grain which may have been shipped from other States to Chicago, nor because it may be transported from thence to other States. It deals with it all alike as the subject of the domestic commerce of the State.

For example:—A State may not levy a poll tax upon its citizens who travel beyond its limits, because they exercise such right.

Crandall v. *Nevada*, 6 Wal. 35.

Nevertheless the power of a State to levy a poll tax upon its citizens is unquestionable; and the fact that a portion of such citizens, subject to the tax, exercise their right to travel beyond its limits, affords no ground for exemption. Upon the same principle, the fact that grain may have been, or again may become, the subject of inter-state commerce, does not withdraw the same from the full operation of State laws, at a period when it sustains no such relation.

It is not denied that a State may regulate the warehousing of grain which is the product of its own soil, and not transported to its markets from other States. If so, why may not a State regulate the storage of such grain in connection with like grain shipped to its markets from other States, and by consent of such shippers stored in the same bin and confused in one common mass with the domestic products of the State?

The right of the importer of foreign commodities to an immunity from State taxation upon his sales thereof, exists only so long as he retains the same in their original packages, and ceases as soon as the same are either sold by him or *become confused in the general mass of property in the State.*

Brown v. *Maryland*, 12 Wheat., 419, 441.

License Cases, 5 How., 574, 577, 595.

If such is the rule respecting foreign importations, for stronger reasons should grain shipped from one State to the markets of another State, and there, by consent of its owner, confused with the mass of like grain, which is the product of the latter State, be subject to its general system of internal police, and the laws regulating its domestic commerce, which are of uniform operation, and in nowise discriminate against the products of other States.

Woodruff v. *Parham*, 8 Wal., 123, 140.

III.

THE POWER TO ENACT LAWS REGULATING THE INSPECTION OF GRAIN AND THE STORAGE THEREOF IN PUBLIC WAREHOUSES, IF REGARDED IN ANY SENSE AS A REGULATION OF INTER-STATE COMMERCE, BELONGS TO THAT CLASS OF POWERS WHICH MAY BE EXERCISED BY THE STATE IN THE ABSENCE OF CONFLICTING CONGRESSIONAL LEGISLATION.

State laws which were conceeded to be regulations of inter-state of commerce, have frequently been upheld, upon the ground that the same were of such character as not to require uniform regulation throughout the Nation, and that the same did not come in conflict with any act of Congress.

Thus it is held that: "Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain."

Cooley v. *Wardens of Port of Phila.*, 12 Howard 319.

So, the power to regulate commerce among the States, comprehends the power to control, to the extent necessary for that purpose, all the navigable waters of the United States which are accessible from any other State than that in which such waters lie; and includes the power to keep the same open and free from any obstruction to their navigation, interposed under State authority; and to regulate the construction of bridges across such navigable streams. Nevertheless, a State may authorize the construction of a bridge over a navigable river when the exercise of

such power does not come in conflict with the congressional regulations upon the subject. *Gilman* v. *Philadelphia*, 3 Wal. 713.

The Court say: "The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States."

"Whether the power in any given case is vested exclusively in the general Government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a State enact them in good faith and not covertly for another purpose, they are not in conflict with the power to regulate commerce committed to Congress by the Constitution."

Ibid, 3 Wal., pp. 726–727.

This principle has frequently been affirmed.

Wilson v. *Blackbird Creek Marsh Co.*, 2 Peters 250.

Crandall v. *State of Nevada*, 6 Wal. p. 42.

License Cases, 5 How., 578, 581.

Laws regulating in a suitable manner the inspection and storage in warehouses of the cotton, sugar and rice of the South and Southwest, would be found wholly inappropriate, if applied to the inspection and storage in bulk of the product of the wheat and cornfields of the Northwest. It would be a visionary and futile scheme to attempt uniformity throughout the Nation in such regulations. Heretofore these matters have been safely confided to the municipal regulations of the various States.

The exercise of such power by the States has been found to be compatible with the power of Congress to regulate inter-state commerce.

If Congress in fact possesses the power to regulate the inspection and warehousing of grain, such power has never been exercised. It has hitherto lain dormant. Shall the mere suggestion of the existence of such paramount power on the part of Congress, dispel and strike out of existence all of the State laws upon the subject?

Unless it is held that the inspection and storage of grain, as it is carried on in connection with the public warehouses in Chicago, does not pertain to the internal or domestic commerce of Illinois, but is in reality "commerce among the several States," it must be held that Congress has no power to regulate the same. And to deny such power to the States, it must be shown not only that Congress has power to regulate the storage and inspection of grain in Illinois, but that such power is vested exclusively in that body. We have elsewhere shown that such power may be exercised by the States, which is sufficient for our present purpose.

IV.

THE ACT IN QUESTION IS NOT OBNOXIOUS TO THE OBJECTION THAT IT IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES IN GIVING A "PREFERENCE TO THE PORTS OF ONE STATE OVER THOSE OF ANOTHER."

This proposition might be dismissed with the suggestion that the alleged repugnancy between the act in question, and this clause of the Federal Constitution is not embraced in the assignment of errors, (*Ante*, p. 11) and it is manifestly introduced into the argument of counsel for plaintiffs in error, as a mere make-weight. Its discussion however is germane to the general subject, and we do not choose to avail ourselves of this privilege.

The fifth clause of the ninth section of the first article of the Constitution of the United States contains this provision: "No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue to the ports of one State over those of another; nor shall

vessels bound to or from one State be obliged to enter, clear or pay duties in other"

This clause purports to be a limitation on the power of Congress in framing its revenue laws and regulations of commerce "with foreign nations and among the several States."

It contains no limitations upon the power of the States to frame laws regulating their internal police, and the inspection and storage of commodities offered for sale in their markets.

It was not designed to secure uniform laws or regulations over the class of subjects concerning which the States retained the power to legislate.

Among other prohibitions of power to the States contained in Section 10, Article I, of the Federal Constitution, is the following:

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except *what may be absolutely necessary for executing its inspection law.*"

It is held that this prohibition relates to foreign and not to inter-state commerce.

Woodruff v. *Parham*, 8 Wal., 123.

But this does not confine the recognition of the power of the States to pass "inspection laws" to commodities which are the subjects of commerce with foreign nations.

The Constitution does not assume to confer upon the States the power to pass inspection laws respecting the subjects of foreign commerce, nor to reserve this power to the States from the powers granted to the general Government. On the contrary, it recognizes the power as existing in the States to pass inspection laws, independently of the power of Congress to regulate foreign and inter-state commerce, and notwithstanding the provision that no preference shall be given "by any regulation of commerce to the ports of one State over those of another."

It could not therefore have been the design of the framers of the Constitution, to require uniformity in the laws of the various

States, relative to the inspection of grain, nor to confer upon Congress the exclusive power to pass such laws, even as respects the commerce with foreign nations. A *fortiori* the power of States to provide for the inspection of commodities which enter into their domestic and inter-state commerce should be upheld. We have elsewhere shown that the regulation of the storage of grain in bulk is necessarily connected with the regulation of its inspection. Such grain is not placed upon the market in packages, sacks, casks, bales, or boxes, as is the case with most other commodities, which become the subjects of commerce, and cannot be thus inspected. It is stored in large bins, the property of different owners being confused in one mass, so that the grain of no particular owner can be identified or distinguished from that belonging to another. If the States may regulate the inspection of such grain, the power to regulate its storage necessarily exists in order to render such inspection practicable, and to subserve some useful end. The regulation of such storage cannot be regarded as giving a preference to the ports of one State over those of another. The States may well be allowed to emulate each other as to which shall provide the most efficient system of "inspection laws;" and if one State succeeds in the exercise of this power better than another, it is absurd to charge it with a violation of this clause of the Federal Constitution.

Cooley v. *Board of Wardens*, 12 Howard, 299, 314.

The provisions of the law in question, regulating the storage of grain in public warehouses, and prescribing the maximum rates, are manifestly for the protection and advantage of those engaged in the grain trade at Chicago, and inure to the benefit of the producers and consumers of such grain; and cannot, by any fair mode of reasoning, be distorted into burdens or restraints upon such commerce. The warehouseman is not required to charge the full maximum rates fixed in the law. He is simply prohibited from charging greater rates for storage than those thus prescribed.

In the argument of one of the counsel for plaintiffs in error, it is said:

"If this power is sustained, the legislature may, by another act, declare that every such warehouseman may charge and receive five cents for every bushel of grain received. The citizen of Wisconsin, who lives on the Northwestern Railroad, and raises grain on his farm, or the merchant to whom he sells his products, where prices are regulated by the London or New York markets, or perhaps those of Chicago, cannot obtain the full value of his property, because the five cents levy for the warehouseman of Chicago must be deducted. He cannot escape this gateway of commerce; there is no other route by which the grain can reach its ultimate market, for the lines of transportation all lie through Chicago. * * * * * * * * * *

If the legislature of Illinois can thus make commercial rules, the legislature of New York can do so too. A statute may be passed in regard to the grain elevators at Buffalo, and the farmers and dealers of the West will be subject to such rules as New York pleases to enact, as well as of Illinois. Every other State may exercise the same power, and it is to be supposed that retaliatory legislation would be the sure result. The object of the union of these States, which was to remove just such a state of affairs in the confederation, would be defeated."

The fallacy of the argument of the learned counsel, lies in the fact that the Illinois statute does not undertake to prescribe the minimum rates which warehousemen may charge for storage. Notwithstanding the statute, they may lawfully charge as much less than the rates named in the statute, as they think proper. The "farmers and dealers in the West," for whom counsel seem to feel so much solicitude, will not be likely to feel agrieved if New York should undertake to prevent extortionate charges for storage of grain by warehousemen in that State. The consumers of grain in the East will not have any just ground of complaint

if Illinois prevents extortionate charges for the storage of grain in Illinois warehouses, although such grain may subsequently be shipped to eastern markets. The interests of the producer and dealer in the West, concur with those of the consumer and dealer in the East, in restraining within reasonable limits the charges for the storage of grain, which maybe made by the Chicago warehousemen, who are not inaptly said to occupy the "gateway of commerce," as to all grain bought or sold in the Chicago market. There is not much danger of any serious evils resulting from "retaliatory legislation" of this character. If each State endeavors to promote honesty and fair dealing, and to break up oppressive combinations and monopolies, within its limits, among those who are in a position to control articles of prime necessity for food, it will be absurd to condemn such laws as giving a preference to the ports of one State over those of another, and therefore unconstitutional.

V.

THE ACT IN QUESTION DOES NOT DEPRIVE THE WAREHOUSEMEN OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, WITHIN THE PROHIBITION OF THE CONSTITUTION.

1. The first section of the Fourteenth Amendment to the Constitution, is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is from this section that the Supreme Court of the United States derives its jurisdiction to finally determine whether a

State statute deprives any person of property without due process of law, and is therefore unconstitutional and void.

The Fifth Amendment was always construed as a restraint on Federal power, and not upon the legislation of the States. A similar provision, respecting "due process of law," is found in the Constitution of most, if not all, of the States, and the provision has frequently been subjected to judicial interpretation in the State and Federal courts.

We insist that under no construction of this constitutional provision, which has ever received the sanction of the courts, can it be held that the act in question deprives warehousemen of their property without due process of law, although it prescribes the maximum rates which may be charged for the storage of grain by those following the vocation of public warehousemen.

Slaughter Houses Cases, 16 Wal., 80.

Where the owner of property is left in the unmolested possession and enjoyment of his property, he is not "deprived" thereof within the meaning of this section.

To constitute such deprivation or taking, it must be seized and appropriated to public use, or to the use of another.

Sharpless v. *Mayor of Philadelphia*, 27 Pa. State Rep., 166, 173.

Grant v. *Courter*, 24 Barbour, (N. Y.) 232, 238.

Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him its enjoyment, is not a taking or deprivation of his property within the meaning of the Constitution, and will not entitle him to compensation, or give him a right of action.

Cooley on Constitutional Limitations, (1st Ed.) p. 541.

The law neither takes from, nor deprives any warehouseman of his property. It simply provides that if he uses his property for a specific purpose, and follows the vocation of a public warehouseman, he shall conform to certain regulations deemed essential to the protection of public interests. He is not required by

law to use his property for the storage of grain for the public, nor in anywise to follow the vocation of a public warehouseman.

An individual may be restrained by law from using his property for any particular purpose deemed prejudicial to the public interests, yet if he is left in the possession and enjoyment of his property for other purposes, he is not deprived thereof in a constitutional sense.

A Massachusetts statute, which imposed a penalty on "any person who shall take, carry away or remove any stone, gravel or sand from any of the beaches in the town of Chelsea," passed for the protection of Boston Harbor, was held to extend to the owners of the soil as well as strangers, but not to be such a taking of private property and appropriating it to public use with the meaning of the declaration of rights, as to render it unconstitutional and void, although no compensation was therein provided for the owner.

Commonwealth v. *Tewksbury*, 11 Met., 55.

The Court say:

"But the other and far the more important question is, whether such a law is a taking or appropriation to public use, of the land of all those who own land bordering on the seashore, within the meaning of the declaration of rights, and whether it is a law which the legislature have no constitutional and legitimate authority to make, without providing compensation for such owners.

"The Court are of the opinion that such law is not a taking of the property for public use, within the meaning of the Constitution, but is a just and legitimate exercise of the power of the legislature, to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public.

"It is competent for the General Assembly to restrain the use of property by the owner in any manner or for any purpose detrimental to the public welfare, and such restraint is neither a taking of property for public use, nor depriving the owner thereof,

without due process of law within the meaning of the declaration of rights."

Commonwealth v. *Alger*, 7 Cushing 86.

2. The learned counsel for plaintiffs in errors cite, and seem to place strong reliance upon *Pumpelly* v. *Green Bay Company*, 13 Wal. 166, in support of their proposition that the provisions of the Illinois Statute establishing maximum rates which may be charged by public warehousemen for the storage of grain, deprives such warehousemen of their property without "due process of law." In stating the question presented for decision in that case the Court say:

"The declaration states that by reason of the dam the water of the lake was so raised as to cause it to overflow all his land, and the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land," *Ibid*, p. 177.

The Court held, that to thus permanently overflow and deprive the owner of the use of his land was a *deprivation* or *taking* of his property within the meaning of the Constitution of Wisconsin; and that he was accordingly entitled to a "just compensation therefor." We admit the correctness of that decision; but deny the conclusion counsel seek to deduce from it, viz:—that therefore the provision of the Illinois warehouse law prescribing the maximum rates for the storage of grain which may be charged by public warehousemen, deprives such warehousemen of their property without due process of law.

The case of *Wynehamer* v. *The People*, 13 N. Y. (3 Kern.) 378, is also adduced as authority in support of the same proposition. We might concede the soundness of all that is said in the various opinions of the judges in that case, with safety to the present case,

The substantial question there presented was, whether the Legislature can confiscate and destroy property, to-wit: intoxicating liquors, which had been lawfully acquired before the act in question took effect.

It cannot be claimed that the Illinois Statute produced any such effect upon warehouse property.

The Court of Appeals of New York in a subsequent case, when Justice Hunt was a member of the Court, use this language:

"Yet this is the only ground its violators can occupy to raise any question as to its validity. They are restrained of no liberty except that of violating the law by engaging in a forbidden traffic; and the assumption is not even plausible that the act works a deprivation of property to any one within the meaning of constitutional restrictions upon legislative authority."

* * * * * * *

"It is a groundless pretext therefore, that the act in question conflicts with any provision of the Constitution of the United States, or of this State. It falls within the legislative power, exerted not for the first time, but unremittedly since the origin of the government. No one heretofore has questioned, on constitutional grounds, the validity of such an enactment, or called upon the judiciary to declare it void, and, perhaps, would not at this time, except as emboldened by the inconsiderate *dicta* of some of the judges in the case of *Wynehamer* v. *The People*, 3 Kern. 378. If there be no constitutional objection, the rule fully obtains 'that the will of the Legislature is the supreme law of the land and demands perfect obedience.' Men are not to violate legislative enactments, and expect from courts immunity and protection, instead of punishment. Judicial interposition to vacate or nullify legislative action (unless an infringement of some rule of the Constitution, or an invasion of private rights plainly expressed therein, and intended to be inviolable) would be 'to set the judicial above the legislative, which would be subversive of

all government.' It is the exercise of a judical function, of the most delicate nature, to declare an act of the Legislature void, and it is not to be expected that Courts will assume it, unless the case be plainly and clearly in derogation of constitutional limitations; nor is it to be expected that they will be zealous or astute to find grounds to thwart or defeat the legislative will, or resort to subtle or strained construction to bring a Statute into conflict with the organic law."

Met. Board of Police v. *Barret*, 34 New York 667-8.

If *Wynehamer* v. *The People* can be regarded as authority upon the question actually decided, it will not bear the extension and strain required to make it cover the question arising on this record.

In the recent case of *Bartemeyer* v. *Iowa*, 18 Wal. 133, this Court said:

"The weight of authority is overwhelming that no such immunity has heretofore existed, as would prevent State Legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer* v. *The People*, has held that as to such property, the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard, the case falls within the principles laid down by this Court in the *Slaughter House Cases*.

"But if it were true, and it was fairly presented to us that the defendant was the owner of the glass of intoxicating liquor which

he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the fourteenth amendment, in that regard, as would call for judicial action by this Court?

"Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we authorized to make advances to meet them until we are required to do so by the duties of our position."

Conceding that both of the questions thus stated by the Court, should be decided in the affirmative, when actually presented, it would by no means follow that because the sale of property lawfully acquired, cannot be absolutely prohibited by subsequent laws, that therefore its use may not be regulated by subsequent laws, in such manner as the public interests may require.

3. The fact that the judicial and legislative precedents furnish no express authority for regulating by law the charges of warehousemen for storage of goods, should not be regarded as evidence that the power does not exist in respect to modern elevators or warehouses, for the storage of grain.

The shipping of grain in bulk, and receiving and handling the same in modern elevators, the constant and almost uniform practice of confusing in one mass the property of different owners, the issuing of negotiable warehouse receipts to be used in commercial transactions as the ordinary evidence of title to grain in store, and the combinations among warehousemen to prevent legitimate business competition, are of quite recent development, and are not within the scope or purview of the old authorities relating to the duties and liabilities of warehousemen and forwarding merchants.

The growth and development of this modern practice of shipping and storing grain in bulk is aptly described by Justice BREESE in delivering the opinion of the Court in *The People ex rel.* v. *C. & A. R. R. Co.*, 55 Ill. 112.

He says :—

"When we consider the vast amount of grain annually produced for the market, in the rich country through which this road passes, on its way to the great grain market of the west, the difficulty, if not impossibility, of providing sacks, or other contrivances to secure properly this production for shipment, is quite apparent. This led to the establishment of costly elevators, and they induced the custom, which has obtained with all railroads in this State at least, to receive grain in bulk, it being equally as well protected in that condition in its transit by cars as in sacks, and as speedily unloaded from them by means of the steam power and appropriate machinery employed by them. These erections have had the same powerful influence upon the production of wheat, one of our great staples, as the introduction of the reaper, for without the agency of the latter, those vast fields yearly blossoming with this product, would be devoted to other purposes, and but for the steam car and elevator, if cultivated up to the limit of their capacity, their products could find no market. Hand in hand these powerful influences are at work, and so long as the two latter make no unjust discriminations, and are satisfied with moderate charges, the stimulus to the agricultural interest will be unceasing, and nothing will be wanting to make this the great grain growing State of the West, if not of the Union."

The People ex rel. v. *C. & A. R. R. Co.*, 55 Ill. 112.

The judicial reports of Illinois, furnish ample evidence of the tendency of the managers of railway companies and proprietors of grain elevators and warehouses to enter into combinations to secure a monopoly of the storage of grain, and to compel shippers

from the interior to consign their grain to such warehouses in Chicago, for storage, as may suit the purposes of the managers of the railways and warehouses.

C. & N. W. R. Co. v. *The People.* 56 Ill. 367.

Vincent v. *C. & A. R. R. Co.* 49 Ill. 33.

The People ex rel v. *C. & A. R. R. Co.* 55 Ill. 95.

And in cases where there is no combination between the common carrier and the warehousemen, grain shipped in bulk by a railroad, must of necessity be delivered by the railroad company to some elevator or warehouse upon the line of its road, or connected with it by a railroad track. As might be anticipated, this reduces the number of those who are in a situation to enter into competition for storage of grain, received over any line of railroad, to comparatiely few persons.

The Report of the Railroad and Warehouse Commissioners of Illinois for 1874, (p. 39.) shows that nine business firms controlled all the elevators and warehouses for the storage of grain in Chicago, for the year ending Oct. 31, 1874. Every producer or grain dealer in Illinois or elsewhere, who ships grain to the Chicago market for sale, is compelled to consign the same for storage in some one of these warehouses; and from a physical necessity is limited to those accessible from the railroad track of the line of road upon which he makes his shipment. If he ships to the Chicago market, "he cannot escape this gateway to commerce." (Mr. Goudy's argument, p. 22). He can only escape the Chicago warehouses, by making his shipments to some other grain market than Chicago.

From this condition of affairs, the natural result is that combinations are formed among the fewwarehousemen who thus have the entire monopoly of the storage of grain in Chicago, to charge such rates of storage as they see fit to arrange among themselves, and not such rates as would result from an healthy business competition.

If the Court is to take judicial notice of the manner in which this business is conducted in Chicago, it will not overlook the practice termed "pooling," which has hitherto prevailed among many, if not all, of the warehousemen whose elevators are so situated as to come into practical competition. The substance of this system of "pooling," is understood to be, that the total net profits derived from the storage of grain by all the warehousemen entering into the "pool," is divided among them in proportion to the storing capacity of their respective elevators, without any regard to the amount of business actually done by each elevator. At least, the Legislature had right to take notice of the existence of these abuses at the time of enactment of the law in question, prescribing the maximum rates of storage in such warehouses. And now when this Court is asked to sit in judgment upon the constitutionality of the act of this Legislature, may not the vision of this Court be as broad and searching, in order to possess itself with a complete knowledge of the subject, as that properly exercised by the Legislature at the time of the passage of the act?

In order to determine the constitutionality of the law, may not the Court take judicial knowledge of every fact of which the legislature had the right to take political knowledge, for the same purpose?

If not, then it must be confessed the Illinois Legislature possessed better facilities than is possessed by this court, for the determination of the constitutionality, as well as the propriety and expediency of this law.

However this may be, there is sufficient appearing upon the face of the record to show that these warehousemen maintained a practical monopoly of the storage of grain in Chicago.

It appears from the record that from 1862 up to the time of the filing this information, shippers were compelled to pay such rates of storage as the warehousemen saw fit to demand.

The stipulation upon which the cause was submitted states: that respondents erected the "Northwestern Elevator" in 1862, and "that they have ever since that date carried on in said elevator, and by means thereof, the business of receiving, storing and handling grain for hire, for *which they have charged and received as a compensation such rates of storage as have been from year to year agreed upon and established by the different elevators or ware houses in the city of Chicago*, and which rates have been annually published in one or more newspapers printed in said city in the month of January of each year as the established rates for the year then next ensuing such publication."

In reference to this condition of affairs the following language is used by chief justice Breese in delivering the opinion of the Supreme Court of Illinois in the present case:

"In another part of their argument they say that they, by consent of their customers, have received during the past year higher rates of storage than those specified in the act, and so, in this respect, the act is a plain palpable violation of the clause of the constitution relied on; that depriving them of the value of the use, is depriving them of their property. This argument is answered by what we have already said. It is idle to talk about the consent of their customers to a higher rate of charges than the law allows them to receive. Their customers, before this law was enacted, had no protection against these monopolists. They had no consent to give. They were obliged to have their grain taken to these warehouses, and be subjected to such charges, as the organized combination, shutting out all competition, might choose to demand. The producer and shipper had no alternative but submission. They were completely in the power of this combination, and it does not fail to demand and exact the highest charges."

It thus appears that a few persons, following the vocation of public warehousemen for the storage of grain in Chicago, occu-

pied such a position, that unless restrained by law, they could impose such charges as they saw fit, upon all the grain shipped to that market for sale, and the shippers had no alternative but to submit to their demands.

4. Warehousemen for the storage of grain in the manner the business is conducted at Chicago, are engaged in a public employment as distinguished from ordinary business pursuits. In this regard they occupy a position similar to common carriers who are held to "exercise a sort of public office," and have public duties to perform.

N. J. Steam Nav. Co. v. *Merchants' Bank*, 6 How. 382.

Sanford v. *Railroad Co.*, 24 Penn., State Rep. 381.

Coggs v. *Bernard*, 2 Lord Raymond's Rep. 909.

C. & N. W. R. R. Co. v. *The People*, 56 Ill. 377.

Like common carriers, they are required by law to receive grain from all persons, and store the same upon equal terms and conditions.

Rev. Stat. of Ill. (of 1874), p. 821, § 101.

Ross v. *Johnson*, 5 Burrows, 2827.

In like manner they have a lien for their just charges upon the grain stored with them.

Rev. Stat. of Ill. (of 1874), p. 821, § 106.

Story on Bailments, § 453.

The right of a lien has always been admitted where the party was bound by law to receive the goods of another as bailee.

Grinnell v. *Cook*, 3 Hill (N. Y), 491.

It was held by the Supreme Court of Illinois, before the enactment of any statute to that effect, that common warehousemen were at common law entitled to a lien for their proper charges on the property stored with them. The Court say:

"We can conceive of no reason or policy why common warehousemen should not have a lien on property stored by them for their proper charges and the consequent right to retain the possession until paid.

"It is true the authorities leave the law in this respect somewhat unsettled, but warehousemen, like common carriers hold themselves out as publicans (so to speak), ready, to the extent of their ability, to accommodate, all in the safe keeping and forwarding of property according to the course of commerce; and must necessarily look to the property, rather than to the responsibility of the owner, of whom they seldom have any knowledge, for their reward. In case, therefore, where delivery of the property to the owner is called for, there would seem to be the same reason and necessity for this lien in favor of warehousemen, as of carriers or artizans; and they should stand in this respect, upon the same footing."

Low v. *Martin*, 18 Ill., 288.

Steinman v. *Wilkins*, 7 Watts & Serg., 466, 468.

The first section of Article XIII of the Constitution of Illinois is as follows:

SEC. 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be *public* warehouses.

The use of the word "*public*" in this connection is severely criticised by counsel for plaintiffs in error. (Mr. Jewett's argument, p. 36. Mr. Goudy's argument, p. 38).

Although the ownership of the property is private, the use may be *public* in a strict legal sense. Hence in judicial opinion the terms "public wharves," "public roads," "public houses," and "public warehouses," are of frequent occurrence, although the property may be the subject of private ownership.

Dutton v. *Strong*, 1 Black, 32.

Ives v. *Hartley*, 51 Ill., 523.

Olcott v. *The Supervisors*, 16 Wal., 678.

In the case last cited this Court says :—

"Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*." Ibid p. 695.

When the owners of grain warehouses open the same to the general use of the public, and exercise the statutory right of confusing the grain of different owners in one indistinguishable mass, for which negotiable receipts are issued under the statute; when they take possession of the "gateway to commerce" and place themselves in such position, and pursue their vocation in such manner, that the grain dealers and producers have no option but to use their warehouses for the storage of grain, we respectfully submit that their warehouses may, without impropriety, be designated "public," and that the Constitutional Convention and General Assembly of Illinois, were quite excusable for treating them as such, and had authority to make all necessary regulations respecting such public use.

5. This general proposition is fairly deducible from the authorities :

Whenever any person pursues a public calling and sustains such relations to the public that the people must of necessity deal with him, and are under a moral duress to submit to his terms if he is unrestrained by law, then in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law.

With due deference, we must insist that it is but mere trifling with great and vital interests, to place legislation of this character upon the footing of laws attempting to fix the price of labor in ordinary avocations, or the price of merchandise in the usual transactions of commerce. Upon what principle is it that laws are constitutionally based which fix the price at which money may be loaned? Whatever diversity of opinion may exist as to the wisdom or policy of such laws, no one questions their constitutionality. It has been a long and uniform custom in large cities to license and regulate by law or municipal ordinance cartmen, hackmen, stage and omnibus lines, and fix their maximum rates of charges, and so far as our investigation has extended the validity of such laws and ordinances have been invariably sustained.

Commonwealth v. *Duane*, 98 Mass. R. 1.

So too, as to laws fixing the maximum amount of toll which may be taken by millers for grinding grain.

State v. *Perry*, 5 Jones' Law, (N. C.) Rep. 252.

State v. *Nixon*, Id., 258.

Such laws have been in force in Illinois ever since its organization as a State, and their validity has never been questioned.

Laws of Illinois, (Ed. of 1823) p. 264.

Rev. Stat. of Ill. of 1845, Chap. 71.

Rev. Stat. of Ill. of 1874, p. 702

Notwithstanding these statutes have been so repeatedly re-enacted and continually in force, it is believed no decision can be found holding the same invalid or unconstitutional.

The enactment of laws of this character was no innovation in the exercise of legislative powers. In the third year of the reign of William and Mary, *cap.* 12, *sect.* 24, it was enacted "that the justices of the peace of every county and other place within the realm of England or dominion of Wales, shall have power or

authority, and are hereby enjoined and required at their next respective quarter or general sessions after Easter day, yearly, to assess and rate the prices of all land carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdiction, by any common carrier or wagoner; and the .ates and assessments so made to certify to the several mayors and other chief officers of each respective market town, to which all persons may resort for their information; and that no such wagoner or carrier shall take carriage of such goods and merchandise above the rates and prices set upon pain to forfeit for every such offense the sum of five pounds, to be levied by distress and sale of his or their goods by warrant of any two justices of the peace where such wagoner or carrier shall reside, in manner aforesaid to the use of the party grieved."

Bacon's Abridg. Title "Carriers." [D.]

This act was passed at a time when *Magna Charta* had been recognized as the fundamental law of England for hundreds of years.

This great charter embodied the principle that no person shall be deprived of life, liberty or property, "but by the judgment of his peers, or the law of the land," which is an equivalent for the modern phrase "due process of law."

The validity of this act was repeatedly recognized by the highest English courts, and it seems never to have been regarded by any one as a violation of *Magna Charta*.

Kirkham v. *Shawcross*, 6 Term Rep. 17.

2 Peakes' N. P. C., 185.

10 Mees. and Welsby, 415–417.

Pickford v. *Grand Junction R. R. Co.*

In *Ogden* v. *Saunders*, 12 Wheat., 259, laws "which limit the fees of professional men, and the charges of tavern-keepers and a multitude of others" of a similar character, which are said to

Murray's Lessee v Hoboken Land & Imp. Co 18 How 272-276

"crowd the codes of every State," are referred to as of unquestionable validity.

The right of the General Assembly to regulate ferries and prescribe maximum rates of ferriage is conceded. But Counsel say:

"The right to control is incident to the right to create the franchise; and in the making of the grant, it is entirely competent to affix to it such conditions as to the grantor shall seem proper. But there is no such origin or history in respect to the right to keep a warehouse. The right to build and operate a warehouse was a common law, and always has been a private and individual right. The business is, in its nature, a private business. There are not and never were any exclusive privileges associated with it; nor did the law ever assume to protect it by any special guarantees or penalties."

We have already shown that the practice of shipping grain in bulk, and the storage thereof in modern elevators or warehouses, in such manner that the property of different owners is confused in one indistinguishable mass, is of a recent origin, and it is not to be expected that the common law precedents would meet all questions arising out of these new relations.

If upon a fair consideration of the question it is apparent that every reason exists for governmental control of such public warehouses for the storage of grain, which can be urged in support of such control of ferries, then we insist the principle upon which the right thus to regulate ferries is based, must be broad enough to support the Illinois warehouse law. Why is it that a citizen may not maintain a common or public ferry, and charge tolls therefor without a license from the Government? It will not answer the question to say that the right to maintain a ferry is a "franchise," and therefore the difference!

It is necessary to look beneath the mere word "franchise" and ascertain why it is that the Government is authorized to place

the right of the citizen to maintain a ferry for hire, upon a different basis from his right to follow any other industrial pursuit.

Why may Government say to the citizen, you have no right to maintain a common ferry and charge tolls therefor, even upon your own land, without a license or permit, or unless the franchise has been granted to you? Riparian possessors are not by virtue of such possession entitled to the privilege of maintaining a ferry.

Mills v. *County Commissioners*, 3 Scam., 53.

A ferry franchise is not an incident to the ownership of land. A party cannot maintain a ferry on his own land without the consent of the State.

Trustees of Schools v. *Tatman*, 13 Ill., 37.

Why should a citizen be thus restrained in the use of his own land?

The answer to these questions is obvious.

The ferryman pursues a public calling, and occupies such a position that the public, or those who travel, must avail themselves of his services. When the traveller arrives at the river, he has no option but to submit to the ferryman's terms, and pay such charges as he may demand. He does not staud upon equal terms with him to negotiate a contract as to the price he shall pay.

For this reason the ferryman is not permitted to follow the vocation without procuring a license from Government, conferring the privilege or franchise, and submitting to governmental regulation of his charges.

So too, upon the same principle (if not for stronger reasons) the public warehouseman may be restrained from using his own property to carry on a public warehouse, without procuring a license from the State and submitting to governmental regulation of his charges.

We have already shown that for the year 1874, nine business firms at Chicago possessed a monopoly of the storage of all grain consigned to that market. If unrestrained by law, they can impose such rates upon shippers and producers of grain as they see fit. In the language of counsel, they are in the possession of the very "gateway to commerce."

The right of Government to regulate such public warehouses, we submit, rests upon a more substantial foundation, if possible, than the conceded right to regulate public ferries. The fact that the power was not exercised as to such warehousemen as are known to the old common law, is no proof that it may not be rightfully exercised as to such modern grain warehouses as exist to-day in Chicago.

It is the crowning excellence of the common law that it is not a mere collection of arbitrary rules, but rather the embodiment of vital principles which adjust themselves to the exigencies of an advancing civilization.

When the same reasons exist for governmental control of public warehouses for the storage of grain, as were sufficient to warrant the assumption of such control over ferries, then the power to regulate such warehouses cannot be denied.

The regulation of draymen and hackmen, including the charges they may receive, is conceded to be "within the legitimate exercise of the police powers of the goverment." (Mr. Goudy's argument, p, 46.) It is suggested that this right arises from the fact that such persons ply their vocation upon the public streets.

A moment's consideration will show that the motive and necessity for the exercise of such power, proceeds from another source. It is an application of the same principle which justifies the regulation of the tolls of millers or ferrymen, or the charges of other common carriers. In populous cities and towns, travellers are compelled to employ such means of transportation of their

persons, luggage or other property, as may be at hand, and cannot, without great inconvenience, stop to dicker about the price.

Unless such charges may be regulated by law, those who employ hackmen or draymen would frequently be subjected to imposition and extortion. Moreover such persons, like public warehousemen, pursue a public employment. They are in reality common carriers, who must offer their services to all upon equal terms.

Undoubtedly the regulation of their charges is a legitimate exercise of the police power. If so, it must also be a legitimate exercise of the police powers of the government to regulate the prices which may be charged by public warehousemen, for the storage of grain, who have greater opportunities than hackmen to practice extortion, and also like common carriers pursue a public employment, and must receive grain, in the regular course of their business, from all persons upon equal terms.

"The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not not only to preserve the public order, and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterruped enjoyment of his own so far as reasonably consistent with a like enjoyment of rights by others."

Cooley on Const. Lim., 572.

"We think it is a settled principle," says Chief Justice Shaw, "growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoymen of others having an equal right to the enjoyment of their property, *nor injurious to the rights of the community.* All property in this Commonwealth is held subject to those regulations which are necessary to the common

good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate property whenever the public exigency requires it, which can only be done on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark the boundaries or prescribe limits to its exercise."

Commonwealth v. *Alger*, 7 Cushing 84.

Chief Justice Taney, in the License Cases, thus defines the police powers of a State:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instrumen'ts to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say the power of sovereignty, the power to govern men and things within the limits of its dominion."

License Cases, 5 Howard, 583.

The Supreme Court of Illinois use this language:

"The power to enact police regulations operates upon all alike. This is a fundamental principle, and lies at the foundation of society itself. It is yielded by each member when he enters society for the benefit of all. It is incident to, and a part of, government itself, and need not be expressly reserved, when it grants rights or property to individuals or corporate bodies, as they take subservient to this right. Although individual rights may be said to be absolute, they are all subject to be controlled in their enjoyment for the general good. It is in the just exercise of this power that individuals have been required to fence their lands or forfeit the right to recover damages for trespasses committed by stock, of other persons. So of quarantine regulations to protect communities against the introduction and the spread of contagious diseases; and in prohibiting the exercise of noxious and unhealthy trades and manufactures, and in requiring the fencing of salpetre caves and growing castor beans; in prohibiting the sale of unwholesome provisions, and stock running at large affected with contagious or infectious distempers; from the sale of obscene books and prints, cards and gaming implements. The law has imposed all these and many other duties and prohibitions upon individuals for the protection of citizens. their morals and property; and notwithstanding it may appear in some degree to abridge individuals of a portion of their rights, yet we are not aware that their constitutionality has ever been challenged. Their eminent justice and propriety has commended them to the community at large as highly proper. The exercise of the power may be referred to the maxim, *Salus populi suprema est lex*,' 'That regard be had to the public welfare is the highest law.'"

O. & M. R. R. Co. v. *McClelland*, 25 Ill., 144.

Chief Justice Redfield speaks of the power thus: "There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens in

order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, can be made, so far as natural persons are concerned."

Thorpe v. *R. & B. R. R. Co.*, 27 Ver. 150.

The foregoing authorities are cited with approbation by counsel for the plaintiffs in error. But it is claimed that the principles upon which they rest are not broad enough to support the act in question. We maintain the contrary. As we have already shown, the law does not take from any warehouseman, or deprive any one of his property, within the meaning of our bill of rights or the fourteenth amendment. It simply prohibits the exercise of functions having a most important public relation without procuring the prescribed license, and entering into the statutory bond, conditioned that in the course of such business he will conform to the law. The statute fixes the maximum compensation that they may receive, who voluntarily assume the positions of public warehousemen. This is its full extent.

The fact that the plaintiffs in error were the owners or lesses of their warehouse prior to the enactment of the law in question, cannot affect the question of its validity or application to such warehouse. Would not a statute prescribing a less rate of interest than had previously been authorized by the laws of a State apply equally to those who loaned money they owned before, or at the time of its passage, as well as to those who loaned money subsequently acquired? Would not a municipal ordinance fixing the rates that may be charged by hackmen, or the owners of omnibus lines, apply to those who had previously invested their capital in such vehicles?

There can be no other than affirmative answers to these questions. An owner of such property is not, therefore, "deprived" thereof within the meaning of the Constitution, by the enactment of laws, the effect of which may be to diminish the profits he may make from the use of such property.

In that part of the argument of counsel for plaintiffs in error, wherein they seek to show that the storage of grain in the manner the business is conducted by Chicago warehousemen, is "covered by the word *commerce*," the storage of grain in such warehouses, in its public relations, is placed upon the same footing as the transportation of grain by common carriers. (Mr. Goudy's argument p. 11.) Counsel say "If the carriage of grain in boats and vessels by land and water is *commerce*, then the handling of grain in the manner shown by this record is commerce." * * "This warehouse or elevator is just as necessary for the purposes of commerce and trade, as the bottoms which float on the water, or the superstructure on which the cars run, or the use of locomotives or cars." (*Idid* p. 14.)

If so, then it must be conceded that the storage of such grain in public warehouses is of general public concern, in like manner as its transportation by common carriers.

The public warehousemen must therefore, in the language of the authorities, pursue a "public employment" or "exercise a sort of public office."

New Jersey Steam Nav. Co. v. *Merchants Bank*, 6 How. 381.

Sanford v. *Railroad Company*, 24 Penn. State Rep. 381.

C. & N. W. R Co. v. *The People*, 56 Ill. 277.

If grain warehousemen in Chicago "pursue a public employment" or "exercise a sort of public office" and sustain such relations to the public, that all the grain consigned to "the greatest grain market in the world" must necessarily pass through their hands, we insist that it is a competent exercise of legislative power to pass laws prescribing maximum rates of storage, and thus prevent extortion and an abuse of their position.

A State may enact such laws in virtue of its unquestionable power to regulate its internal commerce; for the storage of grain offered for sale in the markets of a State most clearly pertains to its internal or domestic commerce.

The commission of the offence of extortion is not necessarily confined to public officers strictly speaking. It may be committed by any person who pursues a public employment, and sustains such relations to the public that the people must without great inconvenience, necessarily deal with him.

Thus at common law: "In the case of a miller where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion: and the same if a ferryman takes more than his due by custom for the use of his ferry. And it was held that if the farmer of a market erects so many stalls as not to leave sufficient room for the market people to stand and sell their wares, so that, for want of room they are forced to hire stalls of the farmer, the taking money for the use of the stalls in such a case is extortion."

Bishop Crim. Law, (5th Ed.) § 394.

Rex v. *Burdett*, 1 Ld. Raymond, 148.

Rex v. *Roberts*, 4 Mod., 101.

1 *Russell on Crimes*, 143.

The right of the State to enact the law in question may safely rest upon its general police powers. The power to enact laws to prevent extortion and an abuse of their position by those engaged in "public employments" or exercising callings in the nature of public offices, most clearly falls within any proper definition of the police powers of the State.

In the language of Chief Justice Marshall: The question whether a law be void for its repugnancy to the Constitution, is

at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Fletcher v. *Peck*, 6 Cranch 128.

"It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."

Ogden v. *Saunders*, 12 Wheaton 270.

The General Assembly of Illinois was the competent and proper body to determine all questions as to the necessity or expediency of the act in question, and in the first instance to pass upon the question of its constitutionality. The majority of the Supreme Court of that State has also affirmed its validity.

Does this record present such a case as will warrant this Court in reversing the judgment of the Supreme Court of Illinois, upon the ground that the Legislature in its enactment, transcended the restraints upon their power, imposed by the Federal Constitution.

No other class of questions can arise in this Court, and these questions are:

1. Whether the right to regulate the storage of grain in public warehouses in Chicago, consigned to that market for sale, is vested *exclusively* in Congress?

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In the

Supreme Court of the United States,

Of the October Term, A. D. 1876.

IRA Y. MUNN and GEO. L. SCOTT,
v.
THE PEOPLE, &c.

Error to
Supreme Court of Illinois.

SUGGESTIONS IN FAVOR OF A RE-HEARING, ON BEHALF OF THE PLAINTIFFS IN ERROR.

BY

JNO. N. JEWETT.

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To the Honorable Morrison R. Waite,

Chief Justice of the Supreme Court of the United States:

I am not aware that there is any established practice of the Supreme Court of the United States, such as prevails in the Supreme Courts of some of the States, in respect to applications for rehearing in cases which have been decided. I have no disposition to trespass upon the Court, or even to seem to do so; but if the view I have entertained of the opinion of the Court in the Munn & Scott Case, (a view quite freely and frequently expressed by many others,) is at all reasonable and proper, the importance of the interests involved in the result of the case, directly and indirectly, is a sufficient apology for suggesting it, in some form, to the consideration of the Court. This, and this only, I have endeavored to do in the following pages, which are respectfully submitted as containing some of the reasons for asking of the Court, a reconsideration of the opinion and judgment in that cause.

JOHN N. JEWETT.

CHICAGO, April 26, 1877.

To the Honorable, the Judges of the Supreme Court
of the United States:

The prominent position given by your Honors to this cause in the decision of a series of cases, involving to the last degree the existence of private rights in and over the wealth and industry of the country, whenever they come in contact with a public use or convenience, was as unexpected as it was unsought for by the plaintiffs in error and their counsel. The result of that position is to place before the world the case of *Munn & Scott* v. *The People, etc.*, as an exponent of the estimation in which the judicial department of this government holds private interests, and the right of personal control over individual enterprises, and of the force and effect accorded by the same high authority to constitutional limitations upon the legislative power of the States. These are questions of immeasurable importance, not only to the millions of capital already invested in enterprises of a public, or *quasi* public character, and in the successful accomplishment of which the public have been largely, although indirectly interested; but also to the almost infinite variety of prospective improvements which are likely to present themselves in the progress of a still undeveloped territory, which experience has shown cannot be safely or economically undertaken by the States themselves, in their corporate capacity, and in the promotion of which it is against the expressed policy of the State, in a large majority of cases, to interfere. The case is thus made to assume an importance altogether disproportionate to the pecuniary interests directly involved in it. It reaches out to, and its decision is made to include the safety and stability of interests embracing a very large part of the invested private capital of the country, and must be looked to as the decisive exposition of the degree of

protection which the constitution affords to private industry, energy and ability, and to the results which may be accomplished through their instrumentality.

It is not too much to say that the opinion of the Court in this case has sent a chill of apprehension through the very heart of the business enterprises of the nation, and that there is no interest or employment, however remotely connected with the public advantage, which does not sympathize with this apprehension. It has opened a new gateway of attack upon private industry, whenever its influence extends beyond the individual good, and concerns itself with the common welfare; it has pushed aside the obstructions which stood in the way of communism, or, at least, of the communistic spirit, against which the prohibitions of the constitution were directed. It has placed minorities in civil society at the very feet of political majorities, and rendered possible and probable even, the despotism of a political majority, which, if the constitution does not prevent, it but inaugurates the skeleton of a government, with vital forces only for evil; it makes the individual and his substance the legitimate prey of the body politic, and starts the government of the States on a new departure, the highway to the plundering of individual wealth, and the destruction of private enterprise.

The right of the State to take private property for public use, upon making just compensation therefor, has been well understood by all the people of this nation. They have been long familiar with the proposition that they held their property, subject to this ultimate right of the Government. They have recognized the fact, that public necessities might arise which would require of them a surrender of their personal possessions, however hallowed by private preferences or ancestral recollections; and when such necessities have arisen, they have acquiesced and yielded up their preferences and their wishes to the stern commands of a public law, which entertains as little respect for the graves of the dead and the memories of the living, as it does for the wild flowers which flourish and fade on the sur-

face of the unbroken wilderness. But in doing this they have trusted to what was regarded as a principle of financial honesty, permeating and underlying the government of the State, engrafted into the constitution and rendered immutable by adoption as a maxim and axiom of State and Federal polity, that no citizen should be condemned without having an opportunity to be heard in his own defense, and that no man should be deprived of life, liberty *or property* without due process of law. The people, and by the term is intended the individuals comprising the body politic, have thought that these high-sounding constitutional phrases meant something; and that they were not mere glittering generalities, "*ignes fatui*," illuminating the way to some dragon's den, and deceiving the wayfarer by a bold appearance of genuineness. The people have depended upon them and trusted to them, as truthful and reliable expressions of governmental policy, which could not be changed by mere legislative act; and this reliance and trust has ripened into a conviction, that although the State might not concern itself with the tender memories and sentimental preferences of its citizens, it was and always would be, regardful of their property values, and that it stood prohibited by the very constitutions under which it was organized, and which had been set up as a standard of government for itself, as well as for its people, from appropriating either the property or the results of the property of a citizen to itself, without paying just compensation therefor; and that for the determination of all such questions of values, as they might arise between the State, or the public and the individual, there had been established a common tribunal, distinct from the political power and independent of it, to which and before which, the State, as well as the individual, must submit its complaints, whenever and wherever they touched the property rights and property interests of the citizen.

A hundred years of constitutional protection, has matured this conviction into consistency as a fundamental principle, around which, as an assured axiom of republican government, had crystalized in various forms the enterprises and industries

of the people, scarcely one of which was able to separate itself from a public use or a general advantage; and yet, to very few of them had the State or the public, contributed in such a way as to be able to claim that they were not, in the strictest sense, the result of individual forethought, energy and capital. To this conviction, the Dartmouth College case, violently assailed by political demagogues, and here and there by a single judge, but never directly questioned or formally repudiated by a court, has given practical and efficient support; but the opinion of the court in this case has laid the train, by which to undermine and destroy the foundation, upon which that time-honored and conservative decision was established, and already eager hands are clustering around, waiting for the signal to apply the torch, and eager mouths are ready to join in the cry, and share in the spoils which will follow the final overthrow.

It is confidently submitted, that the conviction above mentioned, as to the sacredness of private property and private rights *in* private property, represents fairly the business and professional judgment of this country, as it has existed for the past one hundred years. If this was a mistaken judgment, the mistake has been a fatal one to many a private fortune, and it may prove equally fatal to the public, that the mistake has been discovered; but, in the confident belief that this judgment was sound in principle, just in theory, and well supported by constitutional guaranties, properly construed, and that the opinion of the Court in this cause is founded, to some extent, at least, upon a misapprehension of the facts of the case, a misapplication of the doctrines of the common law, and its maxims, and a construction of the constitutional guaranties to private rights, in a great degree subversive of the beneficial purposes they were intended to accomplish, the plaintiffs in error respectfully petition for a reconsideration of said opinion, and for a rehearing in said cause, and, in support of their petition, submit the following reasons and considerations:

I.

The legislation under review in this case, whatever may be its pretensions, is aimed directly and solely at the warehouses and warehousemen of the city of Chicago. No persons or locations are mentioned in the act, which is limited, by its terms, to cities having 100,000 inhabitants and upwards. As there was no other city in Illinois, at the time of the passage of the act, having a population of one-fourth that number, it is quite superfluous to speak of the act as applying to "*warehouses at* "*Chicago, and other places* in the State having not less than one "hundred thousand inhabitants." It does not appear that the Court regarded it as of any importance whether the act had reference to the whole State, and to all warehouses and warehousemen within its jurisdiction, or to only a limited section of the territory of the State, and the warehouses located therein, although it was urged in the printed arguments, and some authorities were cited upon the point, that this local and discriminating feature of the act deprived it of the essential characteristics of a *law*, and reduced it to the proportions and qualities of a legislative edict or judgment against a particular class of individuals, such as the courts have heretofore pronounced to be without the legislative power, and therefore unconstitutional and void. It was, and still is, insisted, that such discriminating and personal legislation is repugnant to the last clause of the fourteenth amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the *equal* "protection of the laws."

II.

The old and trite formula, so often repeated, and so often made the pretext for pushing aside a constitutional question, that "every statute is presumed to be constitutional," is entitled to all the consideration which a formulated apology for

hasty and passionate legislation can lay claim to. There is no reason, *in fact*, why a claim based upon a statute, should have any presumptions in its favor when that claim is made in the due course of judicial inquiry. In all such cases, there should be a suspension of judicial judgment, until a clear apprehension of all the facts is arrived at, and it is clearly understood what the cause of complaint is, and how the elements of which it is composed arrange themselves with reference to constitutional provisions. If a State legislature should pass an act condemning a citizen to be burned at the stake, there is no apparent reason why it should have any *presumption* of constitutionality in its favor. The case may be an extreme one; but theories, to be reasonable, must be reasonable in their extremest application and consequences. It is not expected that there should be any presumption against the constitutionality of an act of a State legislature; but when a question of constitutionality is raised in the courts, it should stand, as any other question, unembarrassed by *presumptions*, and no weight or concurrence of authority can establish a reasonable formula to the contrary.

The Constitution is, or should be, an ever-present fact. It was ordained and established as a continuing authority. Its principles are constant and vital factors in the settlement of all controversies, whether between individuals or States, and *to presume* against their violation, when the question of violation is submitted, is the exact equivalent of entering upon an investigation with a partisan or prejudiced judgment, to be worked out in the result, by such means as may be found best adapted to that purpose. It is respectfully insisted, also, that there is no such thing as degrees of constitutionality. And where the validity of a statute is questioned, for constitutional reasons, there can be no decision of the subject upon presumptions; and there is no proper place for doubts and conjectures. Especially must this be so, when the cause is one of criminal jurisdiction; else there are two doubts and two presumptions antagonistic to each other, viz., a doubt and presumption in favor of the validity of the legislative act, and a doubt and presumption in

favor of the *innocence of the accused.* And in behalf of personal liberty and private property, which the Constitution was intended to protect, it is submitted that the latter should be as potential as the former.

III.

The definition of a body politic, as set out in the preamble to the Constitution of Massachusetts, is not objected to; but its application, as illustrated in the opinion of the Court in this case, is denied; and it is not readily understood how the legislation, involved in this controversy, being *partial* and *personal*, can be reconciled with "a social compact by which the whole people " covenant with each citizen, and each citizen with the whole " people, that *all shall be governed by certain laws* for the com- " mon good." If such language means anything of good to the citizen, that meaning is found in the clear intimation that he shall have protection for his person and property *under just and general laws, bearing equally upon the whole community.* And it is insisted that this was, and is the equitable purpose and theory of our representative government, and of the constitutional guaranties in respect to private rights.

Whilst it is readily admitted that, in becoming a member of civil society, each individual surrenders something of personal rights and privileges, which he might otherwise, and naturally lay claim to, still it ought not to be overlooked that the rights and privileges, so surrendered, depend largely upon the character and principles of the society into which he becomes incorporated. If he enlists himself under the banner of an absolute despotism, he yields himself and all his interests to the dictation and control of the superior or sovereign; but from this position of *abject submission*, there stretch out all degrees of subjection and liberty, until the utmost verge of personal independence is reached. Between those two extremes are embraced the various forms of governments, civilized and uncivilized, which have, or can

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have a recognized standing; and when natural and individual rights are assailed, the question is not whether, under the forms of civil society, its members have surrendered *some* of their natural rights and privileges, but *what rights and privileges* are preserved and protected to them, under the particular form of civil society to which they owe an allegiance. In this view, the precedents and illustrations, established and found under one system or theory of government, cease to have application, where the same system and theory of government do not prevail; and there can be little hope for the success of constitutional government, professedly intended for the protection of private rights, if, when private rights are assailed, the question of their existence or non-existence is to be determined by precedents and practices which have obtained under governments organically despotic, however much the severity of their exactions may have been modified by self-interest, and an intelligent apprehension of the spirit and temper of the age. Such precedents, undoubtedly, tend to show, that there is no necessary repugnance between the abstract idea of a government of some kind, and the theory or principle which they establish or illustrate; but they are of little assistance in the solution of questions of fundamental law, unless those questions arise under the same or analogous conditions. So, also, there is inherent in every government that right of control which is denominated the *police power;* but what are or shall be the limitations of that power, depends upon the peculiar organization and established principles of the particular government seeking to exercise it. It is not necessarily a wild, floating and uncontrolled power; but must be, in each case, subordinate to the just and proper efficiency of these organic principles upon which the government itself is founded.

In the case of *Pumpelly* v. *The Green Bay Company*, 13 Wallace, 166, this Court said that the constitutional provision, prohibiting the taking of private property for public use, without making compensation therefor, was "*always understood to have* "*been adopted for protection and security to the rights of the in-*

" *dividual against the government*," and " *as placing the just* " *principles of the common law, on that subject, beyond the power* " *of ordinary legislation.*"

It ought not to be assumed, perhaps, that in the opinion in this case, the Court intended to set aside this universal understanding of the meaning and effect of the prohibitions of the constitution, and this leads directly to what may be regarded as the substance and foundation of the opinion and judgment of the Court.

IV.

By a series of assumed analogies, aided by what must be regarded as a misapprehension of two English cases, the Court has reduced the warehousemen of Chicago to the condition of public servants, and their business to that of a public or *quasi* public employment, contrary to the theory and principles of the common law, which it was the purpose of the constitution to place " *beyond the power of ordinary legislation.*"

There is no common law of the United States, and the common law of England is only so far in force in the several States as it may be recognized by their respective constitutions and laws. The State of Illinois has adopted it partially, and in the following language: " That the common law of England, *so* " *far as the same is applicable and of a general nature*, and all " statutes or acts of the British Parliament made in aid thereof " and to supply the defects of the common law, prior to the fourth " year of James the first, excepting the second section of the " sixth chapter of 43d Elizabeth, the eight chapter of 13th " Elizabeth, and ninth chapter of 37th Henry Eighth, *and* " *which are of a general nature and not local to that kingdom*, " shall be the rule of decision, and shall be considered as of full " force until repealed by legislative authority." To this extent the common law of England is, and for many years has been, in force in Illinois, and there is no declaration of the gen-

eral common law of England, or act of the British Parliament of a general nature in aid thereof, within the limits of the law above quoted, by which the public, or *quasi* public character of warehousemen, or of warehouse property, can be established; at least none such has been referred to either in the argument or opinion in this cause, and it is, therefore, fair to presume that none such exists. The common law distinction between a public and a private employment, in the matter of bailment, is fully and fairly expressed in the opinion of Chief Justice HOLT, in the leading case upon the subject, of *Coggs* v. *Bernard*, Lord Raymond's Repts., 909 (2 Smith's Leading Cases, 346), where he says: "As to the fifth sort of bailment, viz., a delivery to carry or "otherwise manage, for a reward to be paid to the bailee, those "cases are of two sorts, either a delivery to one *that exercises* "*a public employment*, or a delivery to a private person. *First*, "if it be to a person of the first sort, and he is to have a reward, "*he is bound to answer for the goods at all events.* * * * The "*second* sort are bailees, factors and such like. And though a "bailee is to have a reward for his management, *yet he is only* "*to do the best he can, and if he be robbed, &c., it is a good* "*account.*"

The distinction here asserted has been consistently maintained in England and in this country, ever since the decision of *Coggs* v. *Bernard*, until now, and it may be said to be one of the just principles of the common law, which it was the purpose of the constitution to place "beyond the powers of ordinary legislation."

The warehouse law of Illinois does not undertake to do away with the common law distinction between the liability of common carriers and the liability of warehousemen. Indeed, the distinction is fully preserved in the law itself; for, in the language of Judge HOLT, the warehouseman, under the law, "*is only to do the best he can*," to relieve himself of all responsibility for the property received into store.

It seems, from the opinion of the Court, to have been thought that the cases of *Allnut* v. *Inglis*, 12 East., 527, and of *Bolt* v. *Stennett*, 8 Term Reports, 606, afforded some authority for the

legislation in question. It is respectfully submitted that a careful examination of the facts in these cases, and of the grounds of the opinions of the several judges, will show that they have no proper application here. The attention of the Court is asked to a condensed statement of those cases in support of this proposition.

The first of the above cases was, in effect, against the London Dock Company, the defendant being its treasurer. The company was organized under chapter 47 of the acts of 39 and 40, Geo. 3, known as the " London Dock act," the act of 43, Geo. 3, chapter 132, being the " General Warehousing act," and the statute of 44, Geo. 3, chapter 100, which was a special act, authorizing certain goods to be stored in the company's warehouses, without the payment of the government dues, thereby making them, *in fact*, government warehouses, in respect to that class of goods. The company accepted and acted upon these several grants of authority, and, in effect, was by virtue thereof *licensed* under the law to transact the business of government warehousemen. The plaintiff, having complied with all the requirements of the law necessary to entitle him to store a lot of goods in the company's warehouses without payment of the importation duties, tendered his goods to the company for storage, at the same time offering to pay " *reasonable hire and reward in that behalf*." The company refused to receive the goods, because the " hire and reward " tendered by the plaintiff was less than the rate fixed by the company in a published schedule of storage charges. Hence the action was brought to test the question whether the company, under the several acts aforesaid, and under the circumstances in which it had placed itself with reference to the public business, could be compelled to store the goods offered to it, for a *reasonable compensation*.

The opening argument of the plaintiff's counsel starts off with the proposition that " *The reasonableness of the hire and* " *reward* offered by the plaintiffs to the company, for the privi- " lege of warehousing their goods in its warehouses, without " the immediate payment of the import duties, *is admitted*."

Then follows this proposition, which is not denied, viz: "It is "a general rule of law that when a party *has a monopoly* "*granted to him for public purposes*, he is bound to render the "service or use of the thing *to which his privilege is annexed*, for "a *reasonable compensation*." And it is upon this proposition that the case was argued, submitted and decided; and neither of these propositions is involved in the case of *Munn & Scott* v. *The People, &c.* The scope of the case is well stated by Lord ELLENBOROUGH, C. J., in an interruption of the defendant's counsel, when he says, (p. 535): "The only question arises on "the bonding act; show us that wines may be bonded else-"where;" clearly throwing the burden of the case upon the fact, as a controlling one, that the company's warehouses had, under the acts and its acceptance of them, a legally constituted monopoly of the business of storing wines in bond.

The opinion of Lord ELLENBOROUGH, (p. 538,) is limited to the facts and conditions of that case, for he says: "There is no "doubt that the general principle is favored, both in law and "justice, *that every man may fix what price he pleases upon his* "*own property, or the use of it;* but if, for a particular purpose, "*the public have a right to resort to his premises* and make use of "them, and *he have a monopoly in them for that purpose*; if he "will take the benefit of that monopoly, he must, as an equiva-"lent, perform the duty attached to it on *reasonable* terms. *The* "*question* then is, whether, circumstanced as this company is, "by the combination of the warehousing act with the act by "which they were originally constituted, and with the actually "existing state of things in the port of London, *whereby they* "*alone have the warehousing of these wines*, they be not, accord-"ing to the doctrine of Lord HALE, obliged *to limit themselves* "*to a reasonable compensation* for such warehousing." Further on, at page 540, the learned judge says: "And there are no "other places at present lawfully authorized for the warehous-"ing of wines, (such as were imported in this case), except those "warehouses within the *London Dock* premises, or such others "as are in the hands of the company. Here, then, the com-

" pany's warehouses were invested with the monopoly of a pub-
" lic privilege, and, *therefore, they* must, by law, confine them-
" selves to take *reasonable* rates for the use of them, *for that*
" *purpose.*" Again he says: " Whether the company be bound
" to continue to apply these warehouses to that purpose, may
" be a nice question, and I will not say to what extent it may go;
" but as long as these warehouses are the only places which can
" be resorted to for this purpose, they are bound to let the trade
" have the use of them for a *reasonable hire and reward.*"

The opinion of GROSE, J., rests the decision of the case solely on the ground of a legalized monopoly.

LE BLANC, J., also places the decision of the case distinctly upon the monopoly which the company possessed, and which it must be remembered, the company had accepted. And he refers to the case of *Bolt* v. *Stennett*, 8 Term Repts., as a case where " the quay, *being one of the public quays licensed* under the " statute of Elizabeth, it was held, that the owner was bound " to permit the use of the crane upon it, and *could not insist*, " either, that the public should not use it at all, or should use it " only upon his own terms, *but that he was bound to permit* the " use of it upon *reasonable* terms."

The conclusion of the opinion of BAILEY, J., shows clearly the ground upon which he placed the decision, when he says (p. 544):

" As to the question whether the company may renounce the " application of their warehouses to this use, I cannot add " to what the Court has already said; but, at least, they cannot " renounce it partially; and *I think*, it would be deluding the " public if the company were able to renounce, at a moment's " warning, the warehousing of the goods for this purpose, *after* " *they had agreed to accept the license and monopoly.*"

It would seem to be almost unnecessary to point out the substantial difference between the facts in the case of *Allnut* v. *Inglis*, and the conditions which surround the case of *Munn & Scott* v. *The People*; but, nevertheless, the attention of the Court is called to a few of the more prominent ones:

1st. The London Dock Company had, by act of parliament,

an absolute monopoly of the business of warehousing wines of the kind in controversy, in bond, and they had accepted the monopoly. In this they become government agents,and to that extent, they had an official character. Their business was a public one, not only in the sense that they were dealing with a large number of persons, but, also, in the sense that they were constituted the agents through which the Government, as such, bestowed advantages upon the trade and commerce of the country. There is nothing at all answering to this in the case of Munn & Scott.

2d. The question before the Court, in *Allnut* v. *Inglis*, was whether the London Dock Company, in its position of government agent, holding a government monopoly by act of parliament, should be compelled to do the business it had thus undertaken to do, *for a reasonable compensation.* The question, in the Munn & Scott case, was the exact reverse of this, and whether the Legislature could compel private citizens, who had received no encouragement or support from the State, and were vested with no peculiar privileges, to give their services and the use of their property for *arbitrary* rates, fixed by legislation, *whether reasonable or unreasonable.*

3d. The London Dock Company was a corporation, owing its existence and powers to the favorable grants of the Government in its behalf, and having only such authority as was specifically conferred upon it. Munn & Scott were citizens of a professedly free government, having all the natural rights not absolutely surrendered by them for governmental purposes, fortified by constitutional guaranties in favor of the essential elements of freedom, viz.: Life, Liberty, *and Property*, against governmental interference.

4th. The London Dock Company had accepted a license from the government for the doing of a business relating to the public revenue. Munn & Scott refused to take a license for their private business, and resisted the effort of the State to change their private pursuits into a public employment.

5th. The effect of the decision in the case of Munn & Scott,

is to lay down as a rule of law, the proposition *that the moment a private citizen enters into a business useful or convenient to a considerable number of people*, that moment the State may assume the direction of him, and fix arbitrarily his charges as between himself and his customers. The effect of the decision in the case of *Allnut* v. *Inglis*, is that when a man accepts a government monopoly in the interest of trade and commerce, he may be compelled to do the business relating to that monopoly for a *reasonable compensation*. It might well be asked whether wider differences and more diverse conclusions can anywhere be found in the whole history of judicial inquiry.

The case of *Bolt* v. *Stennett*, 8 Term Reports, 606, was decided upon demurrer to pleas of justification to a declaration in trespass; and the facts set up in the pleas, *and admitted by the demurrer*, have no resemblance to the facts as agreed upon in the case of Munn & Scott. The pleas stated in substance that the place in which the alleged trespass was committed was a *public, open, and lawful quay*, within the port of London, for the landing thereon of all *customable goods* of all merchants importing the same, *for a reasonable compensation*, to be therefor paid by the merchant to the owner of the quay; that from time immemorial the mayor, and commonalty, and citizens of London have had, and still have, *of right, &c.*, the lading and unlading, by themselves or their deputy, of all goods and merchandise of all merchants, &c.; that the defendant was their deputy for that purpose, and entered upon the quay, *being such public, open, and lawful quay*, and used the crane erected thereon for the purpose of unlading certain goods, &c. The Court held the pleas to be good, at least, against a general demurrer. The cause of complaint would have been the same, in form, if Munn & Scott had sued an agent of the City of Chicago, or an agent of the State of Illinois, a warehouse commissioner, for instance, in an action of trespass for breaking open their warehouse and taking into it a consignment of grain without their knowledge or consent. But there is no *immemorial custom* of the City of Chicago, or of the State of Illinois, which would

have supported such a plea of justification; nor is there any common law or statute to which the defendant could appeal, or the Court resort, for the defendant's protection in committing the act.

The case of *Mobile* v. *Yuille*, 3 Ala., 137, is also referred to by the Court as an authority in support of the Illinois Warehouse Act. The only question involved in that case, of a constitutional character, was as to the right and power of the City of Mobile, under an act of the Legislature, purporting to grant the right, to fix the weight of loaves of bread. The question of the right to fix *prices* was not in the case in any form; nor is there any intimation from the Court upon that question. The right of government to regulate weights and measures has never been denied since civilization had a foothold in the world, and there is no necessity to deny such a right in the States in order to lay the foundation for preserving private property from legislative confiscation.

In all of these cases the courts, as does this Court in the opinion under review, rest themselves ultimately upon certain supposed sayings of Lord Hale in the Treatises "*De Jure Maris*," and "*De Portibus Maris*," (1 Hargraves' Law Treatises, 6 and 78), as embodying the supreme wisdom upon the subjects involved. The distinguished learning, ability, and honesty of Lord Hale are matters pertaining to the history of English jurisprudence, which no one in this age is disposed to call in question. It may, however, without any liability to censure, be modestly suggested, that Lord Hale wrote and lived under such conditions and influences as the Government of England had thrown around him; and whilst it may be true that "In England, even "on rights of prerogative, they scan his words with as much "care as if they had been found in Magna Charta, and the "meaning once ascertained, they do not trouble themselves to "search any further," it does not necessarily follow that the American lawyer or Court should feel compelled to apply his language to cases arising under American constitutions, and to conditions of things existing under them, of which Lord

Hale had no knowledge, and all of which have come into being long since his decease. It is not necessary, either, to overlook the fact that Lord Hale was guilty of serious errors, according to more modern understanding, and was a firm believer in witchcraft, and is by Lord Campbell reluctantly charged with a violation of the *plainest rules of justice*, upon the trial of two women for witchcraft before him, who were convicted and by him promptly sentenced to execution. Lord Campbell also says, in substance, that he could pardon Lord Hale for a belief in witchcraft, but not for receiving, as evidence of its existence, impostures which were exposed in open court. Reverence for humanity ought not to be without qualification.

The quotation of the Court from the Treatise "*De Jure Maris*," (1 Harg. Law Treatises, 6), it is respectfully submitted, cannot be tortured into an authority for the Warehouse Law in this case. The very first sentence of the quotation shows, with reasonable certainty, the origin of the right of governmental control over ferries, and the origin of the authority is a material, if not an essential fact. If it be conceded that the sovereignty of the States, after their independence, took the place of the sovereignty of the king, which, for ordinary purposes of legislation, is a sufficiently accurate statement of the fact, then, by the very text quoted by the Court, "The State has a right " or franchise that no man may set up a common ferry for all " passengers without a prescription, (time out of mind), or a " charter."

But had the king or the State "a right or franchise" that no man may set up a warehouse for the accommodation of anybody who might have goods to store ?

It does not matter for what *purpose* this privilege or prerogative existed in the king, or exists in the State; whether it be for the profit of the king or the State, or "for the protection of the " people, and the promotion of the general welfare." *The fact of its existence is the material and essential one.* And to the plaintiffs in error, it is material and essential that in the case of warehouses no such privilege or prerogative ever existed in

the king, and therefore, as the successor of the king, cannot exist in the State under any fair construction of the common law of England. The case of ferries is, therefore, outside of legitimate comparison.

But still there is another illustration which the Court seems to have regarded as of great authority and pertinency in the determination of this cause, and that is drawn from the Treatise "*De Portibus Maris*," (1 Harg. Law Treatises, 78). Both the pertinency of the illustration and the conclusion drawn from it, are most respectfully questioned. The quotation by the Court is as follows: "A man, for his own private advantage, may, "in a port or town, set up a wharf or crane, and may take "*what rates he and his customers can agree for cranage, wharf-*"*age, housellage, pesage; for he doth no more than is lawful for* "*any man to do, viz, make the most of his own.* * * * It "the *king* or subject own a *public wharf* into which all persons "that come to that port *must come and unlade or lade their* "*goods*, as for the purpose, because they are the wharfs only "licensed by the *queen*, or because there is no other wharf in "that port, as it may fall out, when a port is newly erected; *in* "*that case* there can not be taken *arbitrary and excessive duties* "for cranage, wharfage, pesage, &c., neither can they be en-"hanced to an *immoderate* rate, but the duties must be *reasonable* "*and moderate*, though settled by the king's license or charter. "For now the wharf and crane, and other conveniences are "affected with a publick interest, and they cease to be *juris* "*priviti* only, as if a man set out a street in a new building on "his own land, it is now no longer bare private interest, but is "affected by a publick interest."

The illustration from the "treatise" is, itself, exceedingly well illustrated by the concluding part of the quotation, which seems to have entirely escaped the attention of the Court. Take the beginning and conclusion of the paragraph together, and there is no need of better authority against the validity of the warehouse law of Illinois. The author is evidently speaking of a dedication to public use, whether by voluntary act, or under a

license from the crown, or by prescription, is immaterial. This is apparent from the illustration of the setting out of a street, in which, if opened generally, the public acquire an easement or a right of user—but in all such cases, the degree of interest which the public acquires, depends upon the character of the dedication. As a rule of property, it is admitted, as asserted by Lord ELLENBOROUGH, "that every man may fix what price he pleases "upon his own property, or the use of it." The exception is, that "if, for a particular purpose, *the public have a right to* "*resort to his premises and make use of them*, and he have a *mo-*"*nopoly of them for this purpose*, if he will take the benefit of "that monopoly, he must, as an equivalent, perform the duty "attached to it *on reasonable terms*," (*Allnut* v. *Inglis*, 12 East., 537. And this is the construction put by Lord ELLENBOROUGH on the quotation, made by this Court from the treatise "*De Portibus Maris;*" and the quotation, thus interpreted, becomes consistent with constitutional principles and the theories of the common law, "that every man may fix what price he "pleases upon his own property, and the use of it."

It is not to be denied that certain formulas and illustrations, well enough, perhaps, in the connection in which they were originally used, have been handed down from one generation to another, in the administration of the law; and, by their antiquity, they have, in the minds of many, acquired an "odor of sanctity" which it is almost impious to call in question. They run easily into common discourse, and are repeated in text books and opinions of courts as the ultimate authority, and it not unfrequently happens that they are wrested from their ancient application and made to perform service in relations which are foreign to their origin. Their meaning is expanded or contracted, to suit particular emergencies; but it is seldom that they meet with a fair and careful analysis, or are considered *with just reference* to the connections in which they are used. And it is respectfully insisted that Lord HALE, (if he was the author,) in preparing the treatise "*De Portibus Maris*," not only did not have in mind, as embraced within the scope of its language,

such conditions as surround the warehouses of Chicago, but also that, in so far as these conditions are analogous to the cases put by him, his high authority is directly against the construction given to it by the Court. The subject of which Lord HALE was treating, (if the treatise is properly credited to him, of which there is much doubt,) was the water courses and water highways of the nation, whether navigable or not navigable, and which were, in themselves, and from the very nature of things, of *public concern*, and of which it is said in chapter 3 of "*De Jure Maris*:" "Again, there be other rivers, as well "fresh as salt, that are of common or public use for carriage of "boats and lighters; and these, whether they are fresh or salt, "whether they flow and re-flow or not, *are prima facie publici* "*juris, common highways* for man or goods, or both, from one "inland town to another."

A wharf or a landing, with its appurtenances, is an adjunct of this *natural public highway*, and is necessary to its use and enjoyment. In many, if not in most instances, it is an encroachment upon the natural highway itself; and, therefore, such wharf or landing inevitably takes upon itself a portion of the public character of that to which it is an adjunct or appurtenance. But further on, and in the same chapter, the same learned author says: "*But if any person, at his own* "*charge, makes his own private stream to be passable* for "boats or barges, either by making of locks or cuts, or drawing "together other streams, and hereby that river, which was his "own in point of propriety, became now capable of carriage of "vessels; yet *this seems not* to make it *juris publici*, and he may "pull it down again or apply it to his own private use. For it "is not hereby made to be *juris publici, unless it was done at a com-* "*mon charge, or by a public authority, or by long continuance of time* "*it hath been freely devoted to a public use.*" To a proper understanding of the treatise ascribed to Lord HALE, this, with other parts thereof, should be considered, and the whole regarded in its relations to the subject of which the author is treating. The reverse of this, however, is often the case, and a sentence,

separated from its subject, and out of its proper relations, is thrown with careless energy at whatever may appear to stand in its way, and the high authority of the writer is relied upon to break down all opposition. What is asked, in this case, is a fair and discriminating application of the principles of the common law, wherever it may be found authoritatively expounded, defended and protected by the guaranties of the Constitution, in favor of private and individual rights.

In addition to this, there stands opposed to the particular legislation here under consideration, the practice of this country for one hundred years. In saying this, the particular acts of Congressional and State legislation, referred to in the opinion of the Court, are not overlooked ; but whilst these legislative acts are remembered, it should not be forgotten, that only in respect to those matters of admitted public concern, have any of these acts ever been tested by the principles of our constitutions ; and that there is but little argument in favor of the validity of a statute, in the fact, that a similar statute, but upon another subject, has, at some other time, been passed by the same authority, and its validity has never been called in question.

It is possible that discussion upon a question of power may be foreclosed by repeated adjudications ; but the mere fact of the enactment of a statute which was never enforced, or the execution of which was never resisted, makes but a very weak appeal in behalf of the validity of a subsequent enactment, relating to a different subject, although it may be claimed that both are referable to the same source of legislative power. In this connection, the language of Chief Justice TANEY, in the License cases, (5 How., 583), is quoted by the Court, in the opinion in this case, as follows : "They," (referring to the police powers of governments), "are nothing, more or less, than the powers "of government, inherent in every sovereignty ; * * that is "to say * * the power to govern men and things."

The quotation hardly does justice to the full text, but, waiving that, it is not disputed, that the police power is a power "to "govern men and things." That is not the question. The

question is, how, or in what manner, and to what extent, under the constitution, does this governing power attach itself to " men " and things," and *for what purposes.* All valid regulations of trade and commerce, all ordinances for the preservation of the health and safety of the community, the establishment of courts, the division of the powers of government, and all that there is of authority to control by legislation, or otherwise, may be referred to the same source. The power exists unquestionably; but what is its extent and what are its limitations ? It is not an absolute and unqualified power, else every government, whether it be by a single person, or by a majority, is a despotism; and the protection of individuals and, therefore, of minorities, which was the conceded purpose of our constitution, is abandoned. Life, liberty, *and property*, have a degree of protection by virtue of the constitution, and to that degree of protection, the police power *must yield ;* otherwise the constitution is of no value. What is that degree ? The act of Congress of 1820, purporting to confer upon the City of Washington power " to regulate " the rates of wharfage at private wharves, * * *the* " *sweeping of chimneys, and to fix the rates of fees therefor,* * " * * and the weight and quality of bread " is referred to, by the court, as evidence of the unlimited nature of this power, The fixing of the weight of loaves of bread, as already stated. refers itself at once to an acknowledged power of government. The fixing of its quality may be a measure affecting the public health, and is, therefore, readily assigned to a recognized head of governmental control.

The power of the United States, or of the municipality of Washington, to fix a price at which the miserable little " chimney sweep " shall be compelled to clean a chimney, or shall be prohibited from cleaning it at all, is respectfully questioned. As an original proposition, under a constitution giving some degree of protection to personal freedom, it would seem that the right *to control the value of a service* should be coupled with *a right to control the service itself* ; and this does not exist either in Congress or in the municipality of Washington. It may be, how-

ever, that considerations of public safety or public health would appropriately bring the whole business of chimney sweeping under municipal direction, including the prices at which it should be done. If so, plumbing, gas fitting, and repairing, and a thousand other incidents of home living, fall under the same rule. The Government may, then, take charge of the merest incidents of life, and the people are but puppets, to dance as the Legislature may pull the string. There is no judicial authority for carrying the paternal theory of government to that extent.

Wharves, as an illustration in this case, have already been disposed of; but in this same connection, comes up, again, the peculiar condition of the business of the common carrier, the innkeeper, the hackman and drayman, and the regulations of governments in relation thereto. Of all these, the hackman seems to be selected as the representative of the power of the government over private property. Everything must be brought to this standard, and because government has controlled hackmen and has ruled them despotically for centuries, *therefore*, it may rule everybody and everything in the same way. The pertinency and force of the illustration are respectfully denied. There is, in fact, no common standard of measurement between hackmen and warehousemen. The experience of ages has demonstrated, that the former are made up of citizens, it may be, but of that class of citizens least likely to be affected by considerations of honesty. Unrestrained, they intrude themselves upon the public landings and places of public resort, *offensively and viciously*. Their business concerns the stranger and the traveling public, measurably helpless, frequently from inexperience, always on account of absence from home. A long list of impositions, extortions and abuses, are piled up against them, and to a repetition of which, the whole public are exposed. This much may be fairly said of hackmen, in addition to the fact, that they are to be classed with common carriers, who, by the ancient common law, never repudiated, and always in force in this country, are in the exercise of a *public employment*. These things are not true of warehousemen and cannot be made true by legisla-

tion, any more than it is true or can be made true of any other business or occupation, which has a tendency to promote the general convenience or advantage.

It would seem to be useless to follow these illustrations further. In the broadest view of them, they are and have been, in the practice of this Government, exceptions to the rights of private control over private property, and it is again most respectfully submitted, that it is better that they should (if need be for purposes of reconciliation) stand as admitted exceptions to the general law of private rights, than that the whole property interests of the country should, by judicial determination, and against the letter and spirit of the constitution, be brought under the control and direction of the political power.

V.

Most respectful protest is made against the proposition contained in the opinion of the Court in this case, that: " *Property* " *does become clothed with a public interest when used in a* " *manner to make it of public consequence, and affect the com-* " *munity at large*," in the sense in which that proposition is intended. It stands in connection with a reference to the treatise "*De* " *Portibus Maris* " ascribed to Lord Hale, from which the right to regulate the charges for the use of property is inferred. The quotation from the opinion above made, is followed by this language: " When, therefore, one devotes his property to a use " *in which the public has an interest*, he in effect grants to the " publ'c an interest in that use, and must submit to be controlled " by the public for the common good, to the extent of the in- " terest he has thus created. He may withdraw his grant by " discontiuing the use, but so long as he maintains the use he " must submit to the control."

The theory, principles and policy of this government, are all opposed to this proposition of the Court. From the very nature of the case, there can be no private enterprise involving

expenditures, or business, inside of civilized society, which is not "of public consequence," and which does not "affect the community at large," and the language of the Court is, therefore, too broad to be admitted, according to its just signification, without an apprehension of forthcoming evil to all industry and ability. There is no legitimate industry or employment, in which the community, larger or smaller, according to its range of influence, is not interested, and from which that community does not receive a benefit or advantage. The establishment of a rolling-mill, a cotton or woolen factory, a foundry, a saw-mill, a trading house, or any other manufacturing or business depot, is a matter of general, as well as of private concern. The two are indissolubly connected, from the very nature of the case, for it would be the height of folly to engage in any of these several occupations, unless a public demand were to be answered thereby. It is by seeking out the public wants and conveniences, that private capital finds employment for itself, in any of the departments of business which are open to it. The proposition that, in doing this, the citizen is exposing his investment to the risk of depreciation and ruin, by placing the returns therefrom under the control of political influences, is new to the people of this country; not justified by their experience, and is not readily accepted as a just exposition of the degree of protection to which they are entitled under the Constitution. The common law doctrine, that "a man may make "the most he can out of his own," is the doctrine under which the people of this country have lived, and upon which they have relied; and whilst it may be true, that in special cases advantages, unconscionable in their nature, may have been insisted upon, when circumstances have conspired to make them practicable, still there is little reason for complaint on the part of the public, when the general benefit resulting from the free investment of private capital in improvements of a public character, are taken into the account. And considering the absence of conservative influences in legislative assemblies here, which influences prevail, in a high degree, in the British Parliament, it

tion, any more than it is true or can be made true of any other business or occupation, which has a tendency to promote the general convenience or advantage.

It would seem to be useless to follow these illustrations further. In the broadest view of them, they are and have been, in the practice of this Government, exceptions to the rights of private control over private property, and it is again most respectfully submitted, that it is better that they should (if need be for purposes of reconciliation) stand as admitted exceptions to the general law of private rights, than that the whole property interests of the country should, by judicial determination, and against the letter and spirit of the constitution, be brought under the control and direction of the political power.

V.

Most respectful protest is made against the proposition contained in the opinion of the Court in this case, that: " *Property* " *does become clothed with a public interest when used in a* " *manner to make it of public consequence, and affect the com-* " *munity at large*," in the sense in which that proposition is intended. It stands in connection with a reference to the treatise "*De* " *Portibus Maris* " ascribed to Lord Hale, from which the right to regulate the charges for the use of property is inferred. The quotation from the opinion above made, is followed by this language: " When, therefore, one devotes his property to a use " *in which the public has an interest*, he in effect grants to the " public an interest in that use, and must submit to be controlled " by the public for the common good, to the extent of the in- " terest he has thus created. He may withdraw his grant by " discontiuing the use, but so long as he maintains the use he " must submit to the control."

The theory, principles and policy of this government, are all opposed to this proposition of the Court. From the very nature of the case, there can be no private enterprise involving

expenditures, or business, inside of civilized society, which is not "of public consequence," and which does not "affect the community at large," and the language of the Court is, therefore, too broad to be admitted, according to its just signification, without an apprehension of forthcoming evil to all industry and ability. There is no legitimate industry or employment, in which the community, larger or smaller, according to its range of influence, is not interested, and from which that community does not receive a benefit or advantage. The establishment of a rolling-mill, a cotton or woolen factory, a foundry, a saw-mill, a trading house, or any other manufacturing or business depot, is a matter of general, as well as of private concern. The two are indissolubly connected, from the very nature of the case, for it would be the height of folly to engage in any of these several occupations, unless a public demand were to be answered thereby. It is by seeking out the public wants and conveniences, that private capital finds employment for itself, in any of the departments of business which are open to it. The proposition that, in doing this, the citizen is exposing his investment to the risk of depreciation and ruin, by placing the returns therefrom under the control of political influences, is new to the people of this country; not justified by their experience, and is not readily accepted as a just exposition of the degree of protection to which they are entitled under the Constitution. The common law doctrine, that "a man may make "the most he can out of his own," is the doctrine under which the people of this country have lived, and upon which they have relied; and whilst it may be true, that in special cases advantages, unconscionable in their nature, may have been insisted upon, when circumstances have conspired to make them practicable, still there is little reason for complaint on the part of the public, when the general benefit resulting from the free investment of private capital in improvements of a public character, are taken into the account. And considering the absence of conservative influences in legislative assemblies here, which influences prevail, in a high degree, in the British Parliament, it

may fairly be presumed, that very little good, with much unmixed evil, would result from giving to legislation the right to dictate terms for the services and use of the property of the private citizen, in his business relations with other members of the body politic. This absence of conservative influence in our legislative bodies, was, doubtless, one of the reasons, if not the main reason, which led to the adoption of the limitations and restrictions of legislative power, included in all the State constitutions, as well as in the Constitution of the United States, the force and effect of which are so seriously impaired, if not entirely broken down by the opinion of the Court in this case.

VI.

The opinion of the Court in this cause is a serious impairment of the authority of the Dartmouth College Case, which has stood as the law in this country for nearly half a century.

The length of this application forbids anything beyond a brief statement upon this proposition.

It is a generally accepted principle, that the State cannot, by legislation, deprive itself of the essential elements of sovereignty, and that no legislative body, representing the sovereignty of the State, can so surrender the rights of sovereignty as to bind its successors. If, therefore, the right to control private interests under the police power, or otherwise, to an unlimited extent, and in the discretion of the State, is an *essential* attribute of sovereignty, which is the assumption upon which the opinion of the Court proceeds, viz., "the right to rule men and things," then, it must, of necessity, follow that contracts of the State, by legislation, are subject to this unlimited reserved power, and cannot conclude the State in reference to the subject matter of such contracts; for the Legislature cannot contract away the sovereignty of the State, either in gross, or in its essential elements. The grants of the sovereign authority to Dartmouth College and its directory, were no more sacred than the govern-

ment grants of the land, upon which the warehouses of the plaintiffs in error were situated. The warehousing business is surelv no more a matter of public concern than the establishment of a university for the education of the people; and, if legislation relating to the property interests and private rights in the former, can be tolerated, it is difficult to see why it may not be had in reference to the latter. The disasters of the end may be seen from the beginning.

It is not to be disguised that there is in the popular mind of to-day a strong tendency toward the breaking down of all the safeguards of property rights. Interests and employments to a great extent are warring against each other, and are fast becoming the basis of party and political divisions amongst the people; and it is here again respectfully repeated, that it was one of the purposes of the constitution to prevent the fluctuations in private affairs, which would necessarily result from the domination of majorities over the private rights and interests of minorities.

VII.

It is respectfully submitted that the authorities referred to by the Court, all of which have been here considered, do not establish that the warehouse of the plaintiffs in error, under the facts disclosed in the record of the case, is, or has been anything other than *juris priviti*, according to the proper legal signification of those terms.

It is very easy to charge one, or even a considerable number of men, with a *virtual* monopoly. In a certain, but very inaccurate sense, the business of the whole world is carried on by monopolies, since, from the nature of things in civilized society, it is impossible for all men to be engaged in the same pursuits. Some occupations are, of necessity, more restricted than others; and the fewer the number engaged in any pursuit, the nearer that pursuit approximates to an exclusive one;

and, if it is honorable and productive, the larger the public or general interest in the persons engaged in it. If one man only has the knowledge of a particular production of common utility, he has, in respect to that thing, an absolute personal control of the supply, and, if it is matter of invention, the Government will, upon application, secure it to him as a monopoly for a series of years, and defend him in the exercise of his right, as a monopolist. The man who sets up a store, or a factory, at the cross-roads, which is nearer to a considerable population than any other establishment of a similar character, enjoys almost, if not quite alone, the privilege of trading with the people of that vicinity. The community has an interest, in a certain sense, surely, an advantage and convenience, from the business thus established. Is it a monopoly, in the meaning of the law, and can legislation come in and fix prices between the merchant, or manufacturer, and his customers?

It is respectfully denied that there can be any such thing as a monopoly, in the sense in which it is used in the opinion of the Court, unless it has an origin, actual or constructive, in grant from the State. There can be no monopoly in a thing or business, which is of common right, no matter how few may avail themselves of that right. When Lord Ellenborough. in *Allnut* v. *Inglis*, speaks of a "*virtual monopoly*," he is referring to a monopoly established by law, and not of one, which falls to a man by the accident of his being the only man engaged in a business, which is equally open to any other man, as a matter of personal right. Yet, in this case, the Court has laid down a general rule, which, in its expansiveness, embraces every useful employment and business of the nation, and brings them all into the condition of Government or *legal* monopolies, subject to legislative regulation, not only as to the manner in which the business shall be done, but, also, as to the prices to be charged for services and the use of property. The language of the opinion is, that "when, therefore, one devotes his property to a "use *in which the public has an interest*, he, in effect, grants to "the public an interest in that use, and must submit to be con-

" trolled by the public, for the common good, to the extent of " the interest he has thus created." It seems hardly possible, that the Court could have well considered the force of this language, in connection with the fact that every new industry, or modification of an old one, in itself valuable, must, of necessity, have a public interest. The Court thus broadly lays down the rule, that any private industry of the country is, as to the compensation it shall receive, subject to regulation by legislation. If this is so, then it may be pertinently asked, what protection to private rights is there under the Constitution? It was a right under the common law, for a man to pursue such useful and honorable occupation as he might select, and to make the most he could of his own.

Further on the Court says, that "a person has no vested " interest in any rule of the common law." Admitted, so long as it remains merely a "rule of the common law"; but property rights, in this country, are not remitted, *for their protection*, to the mere rules of the common law, and, therefore, do not stand upon the sanction of the common law, although that may be referred to for the determination of their origin and extent. In the case of *Pumpelly* v. *The Green Bay Co.*, already referred to, this Court said, that it was the purpose of the Constitution *to furnish protection and security to private rights against the government*, and that it had received the " commendation of jurists, " statesmen, and commentators, *as placing the just principles of* " *the common law * * * beyond the power of ordinary leg-* " *islation*." Whilst, therefore, the plaintiffs in error may rightfully go to the common law for a just statement of their private property rights, they look to the Constitution for the protection of those rights against unjust and discriminating legislation.

The meaning of the opinion, when it says that if a man devotes his property to a public use, he grants to the public an interest in that use, and to the extent of that interest must submit to be controlled by the public, &c., evidently is, that when a man constructs and arranges his premises, with reference to doing a business, which it is for the advantage of the community

at large to have transacted, and actually enters upon the use of *his own premises for that purpose*, then the public, represented by the legislative power, may *arbitrarily* fix the compensation which he shall receive, or at least the maximum compensation which he shall be permitted to receive, for his services and the use of his property in that business. And when such compensation is thus fixed he cannot, by arrangement with his customers, agree for any greater rates than those provided in the law, the legislative rates being conclusive upon the owner, as to their sufficiency and reasonableness. The proposition startles even the prudence of conservatism. By it, an iron hand may, at any time, be laid upon any trade or business of the country. The discretion and judgment of the citizen, in what he has been accustomed to regard as his private affairs, is liable, at any moment, to be superseded by a legislative enactment. Business cannot prosper: industry and enterprise cannot and will not exert themselves. There is no demonstration, possible, that the Constitution was not intended to permit of this. The reply to the proposition, is, that its language indicates no such intention, and for nearly one hundred years it has been practically and judicially construed otherwise.

VIII.

The opinion of the Court reads, as though it was the impression of the Court that the warehousemen of Chicago, and especially the plaintiffs in error, had by law or otherwise an established monopoly in the warehousing of grain. If such was the impression of the Court, it is impossible to tell whence it was derived, for there is nothing in the record, or in the facts judicially known to the Court, from which such an impression can draw reasonable support. There are, it is admitted, a certain class of facts of which the Court will take judicial notice. Information of such facts must, however, reach the Court in some way, and it may be important, that that in-

formation should be accurate; and when the decision of a cause involving, indirectly, the fate of $5,000,000 of property, is dependent upon facts judicially taken notice of, it becomes very essential that the knowledge of the Court should be certain. The suggestions of counsel, by way of illustration or argument, should not be extended beyond their real meaning. The statement of counsel in this case, as to the way in which the business of the Chicago warehouses is conducted, has no real tendency to show a monopoly of the grain business through these warehouses; but, if the impression which the Court derived from that statement is incorrect, the Court will not regard itself as concluded by that impression. It is simply fair to say of the statement so largely quoted from in the opinion of the Court, that it does not show that the grain which comes to Chicago, on its way to a market, *necessarily* passes through these warehouses.

Not to encumber this application with too much of quotation, the following is extracted from the opinion of the Court: "From these it appears that the great producing "region of the West and Northwest sends its grain by "water and rail to Chicago, where the *greater part* of it is "shipped by vessels for transportation to the seaboard, by the "great lakes, and *some of it* is forwarded by railway to Eastern "ports." Then follows a description of the Chicago "*elevators*," and the manner of their use, and a statement of the manner of conducting the business in them for "*more than twenty years*," and that the ownership has "been by private individuals, who "have embarked their capital and devoted their industry to "such business as a private pursuit." Now, it does not appear from this statement that the grain which comes to Chicago has necessarily to pass through these warehouses, or any other warehouses which might be erected to facilitate the transfer or storage of grain; and the fact is, that fully one-third of all the grain which comes to Chicago does not pass through warehouses at all; and it is at the option of shippers whether they will pass their grain through warehouses to vessels,

or send it directly through upon cars. So that there can be no public way, *of necessity*, through these warehouses; and the statement of counsel does not warrant the assumption that there is. The opinion then goes on to state that in 1874 the 14 warehouses adapted to the business of transferring and storing grain, were owned by about thirty persons, and that "nine business firms controlled them." The record contains no such statement, and it may be true or it may not; but admit its truth, what influence can it have upon the rights of the plaintiffs in error? How many individuals and firms would the Court have employed in the business before it ceases to be a monopoly? It is not readily understood why, if only 30 persons and 9 business firms claim to engage in any particular business, those actually engaged in it, should suffer any prejudice thereby. Others may come in, if they are disposed to, and the laws of Illinois provide that warehousemen may condemn private property for that purpose, and that all railroads shall permit connections from their main tracks to warehouses, and shall deliver grain to the particular warehouse to which it may be consigned. The busiiess is open to anybody and everybody; and, that no more are engaged in it, is, at least, *prima facie* evidence that the business is already fully provided for, *and such is the fact.* The river and railroad frontage of Chicago is many miles in extent, and every part of it is open for the erection of warehouses, if *private* citizens will engage in the business. The State, however, owns none of this, nor does it propose to purchase any for warehouse purposes; but instead of doing that, is striving to convert *private* property to a *public use without compensation*, or else to destroy the value of that property entirely. Good morals are as good for States as for individuals, and the Constitution no more protects dishonesty in the public than it does in the private citizen.

But the opinion proceeds to quote from the agreed statement of facts in this cause, to show that the charges of Chicago warehousemen, have been from year to year such as were agreed upon by the parties in interest, the same being "published in

" one or more newspapers printed in said city, in the month of " January in each year, as the established rates for the year then " next ensuing such publication."

It does not appear that this *agreement of the parties in interest* as to the rates of storage, was regarded by the court as involving any wrong towards their customers, or any injustice to the public, although it was insisted for the appellees that it was evidence of a conspiracy or combination against the general welfare; but still this fact, together with the supposed fact that, in 1874, there were only nine business firms and about thirty persons engaged in this particular kind of warehousing business in Chicago, is made the basis of a conclusion that the warehousing business in Chicago " *may* be a *virtual* monopoly." It would seem to be reasonably apparent, from what has been already said, that there is no monopoly in this business, by law, nor is there any in fact, except such as must attach itself to every business, needful or useful to a community, in which, from the nature of things, everybody cannot engage. But if there is a right of Legislative control over private property, dependent upon the fact, that it is, or possesses a monopoly, then, before that right attaches to any particular property, it certainly ought to appear that it *actually* is, or has, such monopoly, and it is not sufficient to conjecture that it may become such. The citizen and his property ought not to be forced to bear the burdens and restrictions of legislation not applicable to their condition. It is not enough to show that a man *may become* a thief in order to justify the court in convicting and punishing him *as a thief*. When a violation of *absolute* rights is claimed, doubts are to be resolved in favor of the accused, and nothing less than certainty is accepted. What *may be*, is inadmissible.

IX.

The Illinois warehouse legislation does not pretend to regulate any of the elements which necessarily enter into the actual expenses of warehouses; nor is there any statute of the State which in any way purports to regulate such expenses.

It must be known to the Court, that the warehousing business is not unattended with actual expenditures for labor, machinery, repairs and general supervision. It is a business as liable to fluctuations in all its incidents as any other, and it is not to be presumed that warehousemen would be neglectful of their private interests, by a failure to accomodate their charges to the changes which, from time to time, may take place in this respect. The Law takes no notice of such variations of expenditure ; but fixes arbitrarily a maximum to be observed, whether expenses are little or great, and is thereby, divested of every claim to equitable consideration, even if it could be pronounced to be constitutional. But there is no constitutional provision, by which a citizen can be compelled to perform a service for less than the actual cost of that service, or alternatively to be deprived of the right to perform that service upon and by means of the property, of which he is the absolute owner.

X.

In the discussion of a question of Constitutional Law, it is hardly admissible to look forward to the consequnces of its decision, except as those consequences may tend to reflect light upon the meaning and intention of the provisions of the Constitution itself, Life, Liberty and *Property* must and will protect themselves, so far as is practicable, by the powers which they severally possess. They are equally and in the same language guaranteed protection against legislative interferences by the Constitution of the United States. Property will not submit to legislative confiscation, suddenly or lingeringly, any more than would life or liberty. The struggle may be long, it may be sanguinary even ; but, as soon as it is determined that the struggle must come, the ultimate result may be plainly foretold; for in all such struggles the history of the world but repeats itself. If the view of the provisions of the Constitution, here taken, is in any degree correct, it was its intention to prevent the possibility of any such antagonism between Legislative

Power and private and property rights ; and the natural consequences of such antagonism ought not to be overlooked, when the force and meaning of constitutional provisions, having relation to such antagonism, are under consideration.

It is respectfully suggested, also, that the words, " no man " shall be deprived of life, liberty or property without due pro- " cess of law," or their equivalent, found in *Magna Charta*, and in the Constitution of the United States, although they may have, *as words*, the same signification, have a very important difference of application. *Magna Charter* was a forced concession of privileges and rights, in favor of the people, from King John, an absolute despot. Whatever of authority was thus separated from the Crown, became vested in the people through Parliament, the representative of the people, as a matter of right. Hence, it follows, that the limitations of *Magna Charta* are not limitations upon the powers of Parliament, and that an act of Parliament is the supreme law of England.

The origin and consequently the application of this provision in the constitution of this government, are very unlike this. Here, the people in their aggregate capacity, after their separation from Great Britain, are assumed to have the supreme authority, and in that capacity, to have met together, by their representatives, to frame a constitution of government. The people, thus represented, combined the whole power and authority of the Crown and of the people of England, and could estop themselves from the exercise of powers, which in England, by *Magna Charta*, were only surrendered by the king to the people, and which the people, therefore, through Parliament as their representative, might still exercise, notwithstanding the provisions of *Magna Charter*.

The Constitution of the United States, in its prohibitions, is a restraint upon *the entire sovereign power*, which " *magna charta* " in England, is not, and, therefore, it is unphilosophical, as well as unjust to the purposes of our constitution, to say, that what is permitted to the English Parliament is permissible to a State legislature; or to infer the validity of the acts of State legislatures, from the fact that similar acts have been passed by the

Parliament of England. In this country the constitutional provision that "no man shall be deprived of life, liberty or property "without due process of law," overreaches all legislative authority. In England the same provision in *magna charta* is no restraint upon Parliamentary power; hence, upon questions of legislative power in this country, the acts of Parliament and the decisions of English courts are undeserving of attention, either as authority or illustration.

XI.

It is unfortunate, perhaps, that the Court, in this case, involving, by way of precedent, so extensively the private interests of the whole country, should have departed so widely in its opinion from the line of authorities cited on the argument. The opinion scarcely makes mention of any argument or authority actually introduced on either side, and it would seem that the Court started out on a new line of investigation in which the services of counsel were of little advantage. The right of the Court to do this is in no way called in question. It can only be regretted, that counsel of such indifferent ability were employed to present to the Court questions of such weight and magnitude. A rehearing of the case might amend the mistake of the plaintiffs in error in this respect—and the importance of the questions involved, is urged as a reason for a rehearing and reargument, which may include a restatement of the argument and authorities heretofore presented, as well as a careful review of the argument and authorities, upon which the opinion of the Court seems to have been predicated—and in the firm belief that public, as well as private interests, demand such rehearing and reargument, your petitioners respectfully ask that the same may be granted.

IRA Y. MUNN,
GEORGE L. SCOTT,
By JNO. N. JEWETT,
Their Attorney.